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AT

Administrative Tribunal

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AT/DEC/688
21 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 688

Case No. 738: NOBLE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Mikuin Leliel Balanda;

Whereas at the request of Miriam Noble, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application with the Tribunal to 30 June 1993;

Whereas, on 29 June 1993, the Applicant filed an application requesting the Tribunal to order:

"(a) That the recommendation of the JAB in paragraph 12 be rejected, as well as the Secretary-General's decision based on said recommendation;

(b) That in accordance with article 9, paragraph 1 of the Statute of the Tribunal, the decision of the Secretary-General as communicated to the Applicant in [a] letter dated 29 August 1991 be rescinded, and the Applicant be reimbursed the amount of $355.37, which was deducted from her October 1991 monthly benefit.

In addition, that all short-payments arising from errors in the Applicant's pension record be rectified, as required, and adequate compensation be made to her for any losses sustained on her pension benefits/entitlements arising from errors and/or omissions in the data on her pension record, attributable to the Respondent;

(c) That in the event the Secretary-General decides to exercise the option provided under article 9, paragraph 1 of the Statute, the Applicant be paid an amount in compensation equivalent to at least two years' net salary of the Applicant in 1988;

(d) That the Respondent accurately and completely correct the inaccuracies in the Applicant's pension record with respect to the crediting of the 74 days specified in paragraph XI of Judgement 407, as well as other errors here discussed by the Applicant and in her related appeal, particular care being taken to ensure that the corrections of the data have retroactive effect as required.

(e) That the Applicant be awarded compensation and interest on all short-payments of her pension entitlements arising from errors or otherwise in her pension record at the annual rate of 18 per cent for the duration involved prior to settlement.

(f) That the Applicant be awarded damages and compensation for the injury and inconvenience, hardship and suffering caused by the deduction of more than half of her monthly benefit for October 1991.

(g) That the Applicant be provided with a detailed explanation concerning the corrections made to the data on her pension record and the status of her pension entitlements."

Whereas the Respondent filed his answer on 18 November 1994;

Whereas, on 25 April 1995, the President of the Tribunal put questions to the Respondent, and on 19 and 24 May 1995, he provided his answers thereon;

Whereas the Applicant filed written observations on 31 May 1995;

Whereas, on 14 June 1995, the Applicant filed an additional statement;

Whereas, on 27 June 1995, the Tribunal put questions to the Respondent, and on 27 and 30 June 1995, he provided his answers thereon;

Whereas, on 11 July 1995, the Applicant submitted comments on the Respondent's submissions of 27 and 30 June 1995;

Whereas, on 12 July 1995, the Tribunal put a question to the Applicant, and on 18 July 1995, she provided her answer thereon;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 3 September 1963. On 25 May 1987, the Tribunal rendered Judgement No. 382, setting forth certain principles for determining the proper deductions for unauthorized absences from work. It directed the Respondent to recalculate and to repay to the Applicant any resulting amounts due, with interest at nine per cent per annum. On 13 November 1987, the Tribunal rendered Judgement No. 407 resolving disputed issues arising in Judgement No. 382. In that Judgement, the Tribunal ordered, inter alia, that the Applicant's days of absence be reduced by 74.

The Applicant retired on 31 December 1988, and her pension benefits commenced on 1 January 1989. On 25 February 1991, the Tribunal rendered Judgement No. 503, holding, inter alia, that the application was an improper effort to relitigate issues involved in Judgements No. 382 and 407. The Tribunal also noted in its Judgement that "the Pension Fund has not yet received a final report on the correct pension contributions by the Organization."

In a letter dated 2 October 1991, the Secretary of the United Nations Joint Staff Pension Fund (UNJSPF) informed the Applicant that he had "finally received a reconciled accounting of your contributory service and leave-without-pay periods from 1981 to 1988 from the UN Accounts Division, together with a revised separation notification reflecting an adjustment to your reported contributions to the Fund." On the basis of this information, the UNJSPF had recalculated the Applicant's entitlements and determined that she had been overpaid a total of $355.37. She was notified that this amount would be deducted from her October 1991 benefit cheque.

In a letter dated 12 October 1991, the Applicant wrote to the Secretary of the UNJSPF noting that "the data thus far provided, fail to satisfactorily account for wide disparities shown in entitlements in a previous record ... as opposed to entitlements now

indicated to the end of 1988" and stating, inter alia, that the deduction made from her October benefit "appears to be premature, and indeed unfair, since I believe an option should have been given me as to the method of repayment ..., assuming your determination of my entitlements is correct."

In a reply dated 4 December 1991, the Secretary of the UNJSPF noted that "the Pension Fund received a final reconciled accounting of your contributory service and leave-without-pay periods from the UN Accounts Division" and advised her that questions concerning that accounting should be addressed to the UN, and not to the Pension Fund. He explained that a difference in the total leave-without-pay reported accounted for the difference between the benefit amounts estimated in the 1987 annual statement and the actual entitlements described in the letter of 2 October 1991. He further explained that in the Applicant's case an exception had been made to commence paying pension benefits provisionally, prior to the resolution of discrepancies in accounting. For this reason an adjustment had to be made subsequently, following the receipt of a final reconciled accounting and the final determination of benefits payable, which "showed that a total excess amount of $355.37 had been paid to you".

On 9 December 1991, the Applicant wrote to the Secretary of the UNJSPF, requesting UN documentation on her separation. She noted that the data sent with the letter of 2 October 1991 was inaccurate in regard to the total period of contributory service and to the total amount of her contributions to the Pension Fund. She submitted data "intended to show not only that you acted in error in deducting from my October 1991 monthly payment, the sum of $355.37 for alleged overpayment of my benefits/entitlements, but moreover ... that substantial balances on my lump-sum and periodic pension benefits also remain to be paid". She noted, inter alia, that the UN Accounts Division had failed to credit 74 days to leave entitlements, pursuant to Judgement No. 407, and itemized the differences between the leave-without-pay reported in the final audit report of her leave record, dated 30 August 1989, and that

reported in the UNJSPF letter of 2 October 1991. She requested reimbursement of the $355.37 deducted from the October 1991 payment, and payment of the "substantial balances" due.

On 27 December 1991, the Applicant wrote to the Secretary-General, attaching copies of her correspondence, to inform him "that the information the UNJSPF sent me ... (which it said was received from the UN Accounts Division) contains major errors that have resulted in substantial reductions of the amounts due me in lump-sum and periodic benefit pensionable entitlements." She requested the resolution of discrepancies in her record to "arrive at an early settlement of my claims for balances due and interest and compensation thereon."

Subsequently, on 6 March 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB). In the meantime, on 3 March 1992, a Senior Personnel Officer, Office of Human Resources Management (OHRM), wrote to the Applicant concerning the implementation of the Tribunal's Judgement No. 407. She noted that the amount due as a result of her being credited with 74 days "has already been paid to you by the Accounts Division" and that OHRM "must issue a P.5 action [Personnel Action] reflecting the above mentioned period as part of your contributory service with the United Nations Joint Staff Pension Fund." She asked that the Applicant contact her to discuss the matter personally, "in view of the complexity of the case."

On 12 March 1992, the Applicant wrote to the Senior Personnel Officer, OHRM, in reference to her letter of 3 March, that she had not been paid the 74 days credit due in accordance with Judgement No. 407. She stated that the issue "involved not only a resolution of the question of non-payment of the 74 days ... but also the issue of erroneous charges of leave-without-pay". She noted that the JAB was considering these matters.

The JAB adopted its report on 11 December 1992. Its considerations, conclusions and recommendations read, inter alia, as follows:

Considerations

8. The Panel considered the fact that wherein the Appellant had the deductions taken from her 1 October 1991 pension check, but did not request an administrative review until 27 December, that this was beyond the two-month period allowed for such. ...

...

10. The Panel further noted that the Respondent acknowledged errors made by the Administration and stated that these would be remedied.

Conclusions and recommendations

...

12. The Panel concluded that no action is necessary inasmuch as this appeal is time-barred, res judicata and remedied. By virtue of any of these, the subject has been rendered moot.

..."

On 7 January 1993, the Director of Personnel transmitted to the Applicant a copy of the JAB report and informed her, inter alia:

> "The Secretary-General reviewed your case in the light of the Board's reasoning and accepts its recommendations as presented in paragraph 12 of the Board's report. No action, therefore, will be taken in regard to your appeal."

On 9 March 1993, the Applicant wrote to the Secretary of the UNJSPF, noting that the JAB report stated "that the U.N. had made the necessary corrections to the record concerning payments of my pension contributions". She asked for "any details showing how these corrections were made and the impact they have had on my entitlements." In her view, such corrections "should result in an increase in my pension entitlements above payments already made." On 6 May 1993, the Applicant wrote again to the Secretary of the UNJSPF, noting that she had received no reply to her earlier letter and requesting again the information sought.

On 29 June 1993, the Applicant filed with the Tribunal the application referred to earlier.

In a letter dated 30 August 1994, the Secretary of the UNJSPF informed the Applicant that on 31 March 1994, he had received a reconciled accounting and a revised separation notification from the UN Accounts Division, resulting in the credit of additional periods of contributory service and the re-determination of her entitlements from the Fund. He informed her that as a result of the recalculations, a lump sum of $496.50 had been processed on 24 August 1994 and benefit adjustments from 1 January 1989 to 31 August 1994, amounting to $864.13, would be included in her September 1994 benefit. He noted, "the above adjustments take into account the recovery of US$355.37 made from your benefit for October 1991."

On 19 May 1995, the Respondent informed the Tribunal that action had been taken to credit the Applicant with an additional period of 60 days of UNJSPF contributory service and to pay her $832.62 in commutation of 8.5 days of annual leave accrued against the 74 days.

Whereas the Applicant's principal contentions are:

1. The Respondent failed, as ordered by the Tribunal in Judgement No. 407, to credit the Applicant with 74 days of contributory service, and provided to the UNJSPF inaccurate information concerning the Applicant's leave entitlement and contributory service, which resulted in the improper deduction of $355.37 from benefits payable to her.

2. The matter has not been "remedied" as maintained by the JAB in its report. The required corrections should result in additional payments reflecting the Applicant's increased pension entitlements.

3. The Respondent's negligence is a violation of the Applicant's terms of employment under staff regulations 6.1 and 11.1 and staff rules 103.16 and 111.3.

Whereas the Respondent's principal contentions are:

1. The application is time-barred as the request for administrative review of the contested decision was not submitted within the required time period set forth in staff rule 111.2(a).

2. The Respondent has taken the required action to accord the Applicant her full emoluments under Judgement No. 407. Although inconvenienced by the Respondent's actions, the Applicant did not incur any substantive injury warranting an award of damages.

The Tribunal, having deliberated from 27 June to 21 July 1995, now pronounces the following judgement:

I. This is an appeal from a decision of the Secretary-General dated 7 January 1993, accepting a Joint Appeals Board (JAB) recommendation to take no further action on the Applicant's claim. The JAB recommendation was based on its conclusion that the appeal "is time-barred, res judicata, and remedied" and that hence, the subject was moot. Except as set forth below, the Tribunal concurs in the JAB's analysis and in the Respondent's decision based thereon.

II. The Applicant's complaint has two aspects. On the one hand, she appears to be challenging, once again, the method of calculating the period of service to which she was entitled for purposes of payments to her by the Organization and the UN Joint Staff Pension Fund (UNJSPF). This is yet another effort to relitigate matters previously decided by the Tribunal, as well as an effort to litigate matters that are time-barred. On the other hand, she complains that the Tribunal Judgement No. 407 was not complied with fully. To the extent that the Applicant's contentions represent an attempt by her to relitigate issues previously decided, there is no doubt that the doctrine of res judicata is applicable as an absolute bar and that any such attempt must be deemed frivolous. Issues that are time-barred are likewise not properly before the Tribunal. However, the

Applicant's contention that the Respondent has not complied fully with what was ordered by the Tribunal in Judgement No. 407 is of quite a different nature.

III. In the Tribunal's view, the JAB erred in concluding that the Applicant's request for a review by the Secretary-General was untimely. She reacted promptly on 12 October 1991, to a letter dated 2 October 1991, from the Pension Fund. It was not until the Applicant received the letter, dated 4 December 1991, from the Pension Fund, that it became clear to her that it was not the Pension Fund but, rather, the Organization with which she had to communicate in order to obtain a correction of Pension Fund payments based on incorrect data resulting from the failure by the Organization to implement Judgement No. 407. Once the Applicant was made aware of this, the record shows that she acted without any undue delay. Hence, the Tribunal decides that her appeal to the JAB was not untimely.

IV. The Applicant, by letter dated 12 October 1991 to the Pension Fund, requested data which had not previously been provided to her in order to assist her in analyzing the correctness of the alleged overpayment. This was provided to the Applicant by a letter dated 4 December 1991, from the Pension Fund. In that letter, she was advised to take up with the UN Administration any questions regarding calculations furnished by the United Nations. This letter apparently crossed in the mail with a letter dated 9 December 1991, from the Applicant to the Pension Fund in which she set forth, to the extent she could, her position regarding errors in past and anticipated future payments pursuant to the letter dated 4 December 1991. She also reiterated her request for the data she had asked for in her 12 October 1991 letter. By letter dated 27 December 1991, obviously written as a result of the letter dated 4 December 1991, from the Pension Fund, the Applicant wrote to the Secretary-General, requesting correction of her record with regard to pension entitlements. This letter specifically informed the Secretary-

General of the Applicant's belief that the Organization had failed to implement Judgement No. 407.

V. The Respondent has acknowledged before the Tribunal the correctness of the Applicant's complaint that, for a lengthy period, the Respondent did not comply fully with Judgement No. 407. As a result, there was a considerable delay in payment by the Respondent to the Applicant of the amount owing to her, and payments she received from the UNJSPF were not what they should have been. This first came to the Applicant's attention in October and December 1991, when she was informed by the Pension Fund that the Organization had transmitted a reconciled report of her contributory service and that it showed that payments she had been receiving provisionally since January 1989, which were based on estimated benefit amounts, had been excessive. The amount of the excess was said to be $355.37 and that amount was deducted from her October 1991 monthly pension, and reimbursed through a subsequent adjustment.

VI. Since the Administration has acknowledged its failure to implement Judgement No. 407, there is no need for the Tribunal to reiterate Judgement No. 407. The Tribunal considers that the Administration, by paying $832.62, representing accumulated annual leave, and by transmitting to the Pension Fund corrections with respect to the Applicant's period of contributory service, has now done what should have been done a long time ago, in fulfilling that Judgement.

VII. The Tribunal notes, however, an extraordinary degree of incompetence or negligence, or both, on the part of the Administration in the handling of this matter, including erroneously informing the JAB that it had fully implemented Judgement No. 407 with respect to the 74-day credit ordered by the Tribunal. Although this erroneous information was furnished to the JAB prior to 11 December 1992, it turns out that it was not until sometime in

1994 that it was actually corrected. And, as late as 4 November 1994, and 22 May 1995, still other errors in information previously furnished by the Administration to the Pension Fund were corrected. A further payment had to be made by the Organization to the Applicant to implement Judgement No. 407, and two separate corrections involving additional payments to the Applicant by the Pension Fund became necessary, the last correction being made only on 30 June 1995. The Tribunal considers such inexcusable behaviour and delays in the implementation of its Judgement to be not only deplorable, but also symptomatic of administrative failings that, if allowed to persist, will further tarnish the public image of the Organization. The Tribunal finds that, in addition to having lost the use of money that should have been paid to her, the Applicant was subjected to both inconvenience and unfair treatment by the Organization. For all this she is entitled to compensation, which the Tribunal fixes at $3,000.

VIII. In view of the foregoing, the Tribunal orders the Respondent to pay to the Applicant the amount of $3,000.

All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Mikuin Leliel BALANDA
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

AT

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Administrative Tribunal

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AT/DEC/689
21 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 689

Case No. 761: METCALFE

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Mikuin Leliel Balanda;

Whereas, on 26 July 1993, Barry Gordon Metcalfe, a former staff member of the International Civil Aviation Organization, hereinafter referred to as ICAO, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 11 September 1993, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

"...

(d) [To order payment of] the difference between the amount paid and his entitlement at level A.5 under the Mobility & Hardship Allowance from 1 July 1990 until 14 February 1992, almost 20.5 months.

(e) ... that interest be paid on the sum due from 1 July 1990 until the date the allowance is finally paid as it should have been a lump-sum payment.

[f] Also, [that] an award be determined to compensate for the effect on the Applicant's health and state of mind caused by protracted argument and ill feeling during the period in question."

Whereas the Respondent filed his answer on 13 December 1993;

Whereas, at the request of the President of the Tribunal, on 10 and 24 May 1995, the Respondent submitted additional documents;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations Conference for Trade and Development (UNCTAD) in 1975, as a Port Operations Expert. He served at UNCTAD through 31 October 1979, and again from 1 May 1980 through 30 September 1987, when he resigned. On 1 November 1987, the Applicant entered the service of the International Labour Organization (ILO). With effect from 27 July 1989, he was transferred to the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP), as an Economic Affairs Officer on a two year fixed-term appointment at the P-4, step X level. By way of interagency transfer, the Applicant entered the service of ICAO on 13 May 1990, as a Training Expert in ICAO's Inter-Regional TRAINAIR Project in Amman (Jordan), on an appointment for 18 months. His appointment was extended for three months, through 12 February 1992, when the Applicant separated from ICAO.

With effect from 1 January 1988, the International Civil Service Commission (ICSC) enhanced the amount and structure of the assignment allowance by a mobility and hardship allowance, for staff who met the requirement of five years continuous service in the UN common system. Correspondence ensued among officials of UNCTAD, ILO, and ESCAP regarding efforts to bridge the thirty-one day break in the Applicant's service prior to his joining ILO on 1 November 1987, in order that he could benefit from the new regulations. On 27 July 1990, the Applicant was advised that these efforts had been unsuccessful and he was denied a mobility and hardship allowance. On 5 September 1990, the Applicant requested the UN Secretary General to review this decision. Not having received a reply to his request, on 12 December 1990, he lodged an appeal with the Joint Appeals Board (JAB).

The JAB adopted its report on 17 June 1991. Its conclusion and recommendation read as follows:

"Conclusion and Recommendation

32. The Panel unanimously

1. Finds that the Appellant had no real intention to resign from the common system and that he had apparently acted on the advice of his future employer;

2. Finds that the Administration made commendable efforts to find a solution to the problem created by the Appellant's resignation from UNCTAD;

3. Finds that provisions of staff rule 104.3 offer a suitable way to rectify the situation in the best interest of the Administration as a good employer and of the Appellant as a staff member with a long period of service in the common system.

33. Consequently, the Panel unanimously recommends that the Appellant be offered to be reinstated as provided in staff rule 104.3."

On 3 July 1991, the Officer-in-Charge, Department of Administration and Management, transmitted a copy of the JAB report to the Applicant and informed him as follows:

"The Secretary General has re-examined your case in the light of the Board's report. He cannot, however, accept the Board's recommendation. Under staff rule 104.3, a former United Nations staff member, who is re-employed by the Organization within twelve months of his/her separation may be reinstated, in which case his or her service will be considered as having been continuous and all separation payments will have to be returned. You were not, however, re-employed by the United Nations on 1 November 1987 but employed by the International Labour Organization (ILO). Accordingly, the above-mentioned provision concerning reinstatement could not be applied in your case. Considering, however, the exceptional circumstances of your case, the Secretary General has decided to exercise his authority under staff rule 112.2(b) to grant you, as an exception to staff rule 103.22(h), in force at the time, the difference between the basic rate and the mobility rate of the assignment allowance for the period from 27 July 1989 to 15 May 1990 during which you served with the United Nations."

In the meanwhile, by letter dated 4 April 1990, the Applicant was advised of ICAO's intention to offer him an appointment. He received a copy of the ICAO Field Service Staff Rules (FSSR) and Personnel Instructions and information as to the entitlements he would receive. On 1 May 1990, the Applicant was offered an appointment with ICAO, which he accepted on 17 May 1990, with effect from 13 May 1990.

The offer of appointment stated "Service under this letter of appointment shall be deemed continuous on service under the contract with the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP). You shall retain all rights and benefits accrued in respect of your United Nations service from 1 November 1987 through 12 May 1990." It also stated "You will not be entitled to receive from the International Civil Aviation Organization any payments, subsidies, expenses or emoluments other than those specified ... in this letter or those applicable in the ICAO Field Service Staff Rules."

After a period of five weeks in Montreal for a briefing and workshop at ICAO Headquarters, the Applicant was granted leave from 19 June 1990 and assigned a mission in the United Kingdom to be undertaken en-route to Jordan. Following this mission, the Applicant arrived in Jordan, his duty station, on 2 July 1990. He was paid an installation grant and an assignment grant, in accordance with the ICAO FSSR in force at the time of his appointment.

With effect from 1 July 1990, new provisions for the payment of assignment grant and mobility and hardship allowances were established for the UN Common System, and incorporated in rules 3.7 and 3.8 of the ICAO FSSR. On 1 August 1990, the UN Administration issued administrative instruction ST/AI/363, providing that, for the purpose of establishing eligibility for the mobility and hardship allowance, "the requirement of five years consecutive service may be considered as met if the staff member has accumulated five years of service within a period of six consecutive years."

The Applicant requested but was denied the benefit of the new provisions of the FSSR as well as ST/AI/363. In a letter dated 31 December 1990, the Applicant requested the Secretary General of ICAO to review the administrative decisions that had been taken regarding his entitlement to the assignment grant and to a mobility and hardship allowance. In a reply dated 6 March 1991, the Secretary General of ICAO confirmed that these decisions were taken in conformity with the ICAO FSSR in force at the time of his recruitment.

On 19 March 1991, the Applicant lodged an appeal with the Advisory Joint Appeals Board (AJAB), with respect to three claims: (a) that he should have been paid an assignment grant in accordance with Section 3.7 of the ICAO FSSR which came into effect on 1 July 1990; (b) that he should have been eligible for the mobility and hardship allowance which came into effect on 1 July 1990; and (c) that his salary increment date should not have changed when he joined ICAO.

The AJAB adopted its report on 8 April 1993. Its conclusions read, in part, as follows:

> **"Conclusions**
>
> 39. ... the Board concludes that the Appellant should have been paid the assignment grant according to paragraph 3.7 of the FSSR which came into effect on 1 July 1990. It therefore recommends that he be paid the difference between the assignment grant calculated according to [paragraph] 3.7 as revised on 1 July 1990 and the installation grant actually paid to him.
>
> 40. Concerning the payment of the mobility and hardship allowance, the Board concludes that the Appellant did not have the requisite 5 years of continuous service on joining ICAO necessary to qualify for the payment of this allowance and that on this point his appeal fails.
>
> 41. In the matter of the Appellant's salary increment date the Board concludes that his transfer to ICAO constituted a promotion, and although the rules in force at the time are not specific on the point, the Secretary General acted in accordance with established practice in amending his increment date to the date of his joining ICAO. ...

42. Concerning the conclusion given in paragraph 39 above, the Board concurs with the assertion of the Appellant that the wording of the revised paragraph 3.7 of the FSSR is contradictory in sub-paragraph c) when it states that the lump sum is payable in twelve monthly instalments. In the Board's view a lump sum is a one-time payment and cannot be so called if paid in instalments. It is recommended that [paragraph] 3.7 c) be amended to remove this ambiguity.

43. Despite its conclusion in paragraph 40 above, the Board has sympathy with the Appellant's claim concerning the payment of the mobility and hardship allowance. It is most regrettable that staff members working side-by-side with staff members of other organizations in the UN common system in a field duty station are subject to different interpretations of essentially the same rules which result in their receiving significantly different allowances. The Board therefore recommends that these interpretations be aligned."

On 1 June 1993, the Secretary of the AJAB transmitted a copy of the AJAB report to the Applicant, together with a copy of the Secretary General's decision, dated 21 May 1993, accepting the conclusions of the Board and noting "The matter addressed in paragraph 43 will be studied further."

On 26 July 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. When ICAO approached the Applicant, it failed to inform him that it did not follow the UN Common System for terms and conditions of service.

2. The UN Common System was established to ensure minimum standards and conditions which could be applied to all staff regardless of the agency they work for.

3. The Applicant was entitled to payment of the mobility and hardship allowance under rule 3.8 of the ICAO FSSR and ST/AI/363.

Whereas the Respondent's principal contentions are:

1. Although the UN Common System seeks to attain a certain harmonization in the internal Rules and Regulations of each Agency,

each Agency has its own internal law that reflects the rights and obligations of its staff.

2. The Applicant was aware of all relevant ICAO Regulations before he accepted the offer of employment with ICAO. Rule 3.8 of the ICAO FSSR sets forth a five year continuous service requirement for the mobility and hardship allowance.

3. ICAO has fully complied with its FSSR and with the Applicant's terms and conditions of employment.

The Tribunal, having deliberated from 5 to 21 July 1995, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary General of ICAO dated 21 May 1993, accepting the conclusions of the AJAB that the Applicant did not have the requisite continuous service on joining ICAO to qualify for the payment of a mobility and hardship allowance. He claims an entitlement to the mobility and hardship allowance since its inception on 1 July 1990 until 14 February 1992, together with interest. He also claims compensation for the effect on his health and state of mind caused by protracted argument and ill feeling.

II. The Applicant served with ICAO in its Technical Cooperation Programme from 13 May 1990 to 12 February 1992. He had been advised of ICAO's intention to offer him an appointment by a letter dated 4 April 1990, to which was attached a copy of the ICAO Field Service Staff Rules (FSSR) and Personnel Instructions. On 1 May 1990, the appointment was offered subject to the conditions of service set out in ICAO FSSR, as amended from time to time. Paragraph 4 of the offer stated:

> "Service under this letter of appointment shall be deemed continuous on service under the contract with the United Nations Economic and Social Commission for Asia and the Pacific (ESCAP). You shall retain all rights and benefits

> accrued in respect of your United Nations service from 1 November 1987 through 12 May 1990."

The Applicant accepted and signed the offer of appointment on 17 May 1990.

III. Under the ICAO FSSR amended with effect from 1 July 1990, the Applicant was paid certain allowances pursuant to rule 3.8. Rule 3.8 provides that in order to receive payment of the mobility element of the allowance, a staff member must have five or more consecutive years of service in the UN common system in a second or subsequent duty station. Accordingly, the Applicant did not receive the mobility element of the mobility and hardship allowance because his uninterrupted service with the UN was shown by ICAO's records as being only from 1 October 1987 through 12 May 1990.

IV. From 1980 until 1987, the Applicant's UN service was continuous in four duty stations. In that period, he was on the staff of UNCTAD. In 1987, he was approached by the ILO to be Chief Technical Advisor of a project in Trinidad and Tobago. He resigned from UNCTAD with effect from 30 September 1987 and joined the ILO on 1 November 1987. The total break in his service was approximately one month. He remained in the ILO's service for over a year and one-half, separating in July 1989. At that time, he rejoined the UN and served with ESCAP until May 1990.

V. The Applicant's break in service in 1987 caused ICAO to conclude that he was not entitled to the mobility element of the allowance. Rule 3.8 of the FSSR, on which ICAO relied, clearly supports the Administration's position. It states in paragraph (b) that it is

> "... applicable, after five or more consecutive years of service in the United Nations common system in a second or subsequent duty station... Staff members ... without five

> years of such service shall be entitled to the percentage reflected in the column for '1st assignment' regardless of the number of assignments they have had."

VI. The Applicant argues that ICAO should be required to follow the same practice as the UN, as reflected in ST/AI/363. That administrative instruction, which is dated 1 August 1990 and issued with effect from 1 July 1990, provides in paragraph 29:

> "... For the purpose of establishing eligibility for the mobility element of the allowance, the requirement of five years consecutive service as a staff member (...) may be considered as met if the staff member has accumulated five years of service within a period of six consecutive years."

The Applicant's contention is that the principle of uniformity of treatment of staff members within the common system justifies reversal of the Respondent's decision and the payment to him of the mobility element of the allowance pursuant to the leeway permitted under ST/AI/363 with respect to the five-year requirement. Although the Applicant's position is one with which the Tribunal sympathizes, it cannot be sustained. The reason is that the Respondent's decision accepting the AJAB's conclusion simply does not constitute non-observance of the Applicant's contract of employment.

VII. As noted above, the Applicant expressly agreed not only to be bound by ICAO Staff Rules as amended from time to time, but also to be bound by the terms of the offer of a post made to him by ICAO dated 1 May 1990. According to that offer, he would retain the rights and benefits accrued in respect of his UN service only from 1 November 1987 through 12 May 1990. Plainly these could not include UN rights or benefits, such as the mobility and hardship allowance, which came into effect only on 1 July 1990. Nor was he to be credited by ICAO with UN service prior to 1 November 1987. The Tribunal is unable to find any legal requirement compelling ICAO to adopt, with effect from 1 July 1990, exactly the same approach as the UN did in ST/AI/363 with respect to defining the five-year continuous service requirement associated with the mobility element.

While uniformity among the members of the common system is desirable and frequently exists, there are variations in interpretation and practice that are permissible. The internal law of one organization is not necessarily applicable to others.

VIII. The Respondent points out that the language of rule 3.8 of the ICAO FSSR is in accord with the model text circulated by the Secretariat of the Consultative Committee on Administrative and Budgetary Questions (CCABQ) as an annex to the CCABQ Sessional Report, incorporating the decisions of the UN General Assembly which adopted the International Civil Service Commission's (ICSC) recommendations concerning the mobility and hardship allowance. Nothing in that annex included language providing that the five-year consecutive service requirement could be met if a staff member had accumulated five years of service within a period of six consecutive years. That suggestion appeared in paragraph A16 of an Administrative Committee on Coordination document ACC/1990/4/ADD.1 dated 29 March 1990, entitled Addendum, ARRANGEMENTS FOR THE INTRODUCTION OF REVISED PROVISIONS RELATING TO MOBILITY AND HARDSHIP EFFECTIVE 1 JULY 1990. Appended to that paragraph is a footnote indicating that UNESCO reserved its position on this "definition." The Respondent informed the Tribunal that this Addendum merely reflected the recommendations of the Field Working Group of the CCABQ, and this does not appear to be disputed. It would thus appear that the Addendum was not binding on all organizations but could be adopted at their individual option.

IX. The Tribunal notes that a somewhat comparable issue was presented to the Secretary General of the UN with regard to an administrative decision denying the Applicant an assignment allowance at the mobility rate with respect to his ESCAP service beginning in 1989. Because of the Applicant's 1987 break in UN service, it was found that he did not meet the requirement for payment of an assignment allowance at the mobility rate. However, in the exceptional circumstances of the case, the Secretary General

decided to exercise his discretion under UN staff rule 112.2(b) to grant the Applicant, as an exceptional matter, the difference between the basic rate and the mobility rate of the assignment allowance for the 1989-90 period of his ESCAP service.

X. The Tribunal recommends that the Respondent consider the possibility of a similar measure (perhaps with an adjustment to reflect the repatriation grant previously paid to the Applicant) in view of the Applicant's long, continuous service in the common system, with only one extremely short break which apparently was no greater than accrued annual leave. The obstacle blocking the Applicant's entitlement to the mobility element under a literal reading of rule 3.8 of the ICAO FSSR is rather technical in nature and it seems questionable whether, in keeping with the purpose of the mobility and hardship allowance, it was intended that staff members such as the Applicant were to be disqualified.

XI. For the foregoing reasons, the Tribunal rejects the application.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Mikuin Leliel BALANDA
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

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UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/690
21 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 690

Case No. 770: CHILESHE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 16 August and 26 October 1993, Jonathan Hannock Chileshe, a former staff member of the United Nations Economic Commission for Africa, hereinafter referred to as ECA, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 3 December 1993, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

> "... to set aside paragraph 22 of the Joint Appeals Board Report No. 1021, Case No. 92-79 of 16 July 1993 that limited itself only to recommending 'an indemnity equal in amount to an SPA [special post allowance] to the D-1 level for the period 1 April 1991 until (Appellant's) separation from the Organization'.
>
> 11. [To find] the sum of US$9,000 as indemnity totally insufficient. The monetary compensation fails to take account of the injury to my integrity, dignity and loss of earnings to which I would have been entitled (i.e. I used to receive DSA [daily subsistence allowance] and travel calculations were at below D-1, my hardship allowance was at a level below D-1 and the interest lost in the intervening period should be accounted for etc.) as a result of not having been promoted in the period in question indicated in paragraph 13 below.

12. ... to decide in my favour to be promoted RETROACTIVELY with effect from 22 December, 1990.

13. [To order] compensation with the support of the Tribunal for what I have suffered as stated in paragraph 11 to the tune of US$60,000."

Whereas the Respondent filed his answer on 29 June 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of ECA on 4 May 1969, as an Economic Affairs Officer at the P-3, step I level, in the Trade and Economic Co-operation Division, Trade Section, on a probationary appointment. He was granted a permanent appointment, with effect from 1 May 1971. He was promoted to the P-4 level, with effect from 1 April 1974, and to the P-5 level, with effect from 1 April 1981. The Applicant's appointment was extended for three months beyond his scheduled retirement date, to 31 January 1993, when he separated from service.

In 1990, the D-1 post of Director, Trade and Development, Finance Division, was advertised with a deadline for applications of 10 September 1990. On 15 December 1990, the names of 15 candidates, including the Applicant, were transmitted for consideration to the Executive Secretary of ECA, who, on 15 January 1991, advised the ECA Personnel Section that none of these candidates was sufficiently qualified for the post. He requested that the post be re-advertised. The post was subsequently re-advertised with a deadline of 29 July 1991.

Pending recruitment for the post, the Applicant was designated Officer-in-Charge of Trade and Development, Finance Division, with effect from 21 December 1990. His functional title was changed with effect from 1 January 1991. In a memorandum dated 2 April 1991, the Applicant requested the Chief, ECA Personnel Section, to pay him a special post allowance (SPA) at the D-1 level, with effect from 21 December 1990.

As a result of the second advertisement process, twenty-four applications were sent by OHRM to ECA for consideration on 23 August

1991. On 5 December 1991, the names of eight candidates, including the Applicant, were forwarded to the Acting Executive Secretary who had succeeded the former Executive Secretary. Discussions as to the restructuring of ECA commenced in December 1991, resulting in the postponement of a decision on the applications for the post.

In an interim report, dated 26 February 1992, the ad hoc Committee on Professional Staff Careers recommended the Applicant for promotion to the vacant D-1 post of Director, Trade and Development. On 23 March 1992, the Acting Executive Secretary wrote to the Chief, Administration and Conference Services Division (ACSD), and asked whether there was any administrative or organizational difficulty in selecting the Applicant for the post, noting that the Applicant was due to retire at the end of October 1992.

In a reply dated 29 April 1992, the Chief of ACSD advised the Acting Executive Secretary that, according to the Manual for Appointment and Promotion Committees at Offices away from Headquarters, promotions should not be granted "within a few months" of a staff member's retirement so as "to avoid the use of the promotion as a means to reward staff members for long service." At a meeting held on 6 May 1992, the Acting Executive Secretary informed the Applicant that he would not be promoted because he was approaching retirement age. On the same date, the Applicant wrote to the Acting Executive Secretary, stating, in essence, that the Administration was unjustly using the policy against promotion where retirement is imminent as a basis for not selecting him for the post, although he had been performing the functions of the post for over 17 months.

On 12 May 1992, the Applicant requested the Secretary-General to review the administrative decision not to promote him to the D-1 post. In a memorandum dated 5 August 1992, the Chairman of the Departmental Panel for the 1992 Promotion Exercise advised the Acting Executive Secretary of ECA that the Panel "would have recommended the present Officer-in-Charge of TDFD [Trade and Development Finance Division] if this were not precluded by the

policy whereby promotion cannot take place within 6 months of a staff member's separation." On 12 August 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

The JAB adopted its report on 16 July 1993, Its considerations, conclusions and recommendations read, inter alia, as follows:

> "Considerations
>
> ...
>
> 19. The Panel did not feel it necessary to establish malfeasance or misfeasance in this case. It is sufficient to note the numerous delays and the failure of management to address Appellant's legitimate claims to conclude that '... Respondent has been negligent as an employer in failing to extend to the [Appellant] fair and just treatment ...'
>
> ...
>
> Conclusions and Recommendations
>
> 21. It is to be regretted that Appellant was not promoted during his service and did not have the satisfaction of recognition by the Organization of his contribution to it, as well as the pecuniary advantages. Had the Panel considered that a recommendation for his retroactive promotion was practical, it would have made it. Instead, it decided that Appellant should be adequately compensated for his services as the official in charge of the Trade and Development Finance Division (TDFD).
>
> 22. ... that Appellant be paid an indemnity equal in amount to an SPA to the D-1 level for the period 1 April 1991 until his separation from the Organization."

On 16 July 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and advised him of the Secretary-General's decision to accept the JAB's recommendation that he be paid "an indemnity equal in amount to an SPA to the D-1 level for the period 1 April 1991 until the date of your separation from the service."

On 16 August 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was not promoted because of incorrect and incomplete information regarding the policy on the promotion of staff approaching retirement, which the Personnel Section of ECA gave to the Acting Executive Secretary.

2. Delays in considering the Applicant's promotion by OHRM, by the ECA Personnel Section and by the restructuring exercise have resulted in unfair treatment.

Whereas the Respondent's principal contentions are:

1. The Applicant has no right to promotion, only a right to be considered for promotion.

2. While there was some delay in the process of selection of candidates for the vacant post, the delay was not malicious, nor an abuse of process.

The Tribunal, having deliberated from 6 to 21 July 1995, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General dated 16 July 1993, not to promote him retroactively to the D-1 level. Instead, in accordance with the recommendation of the JAB, the Secretary-General decided that following his retirement, the Applicant should be paid an indemnity equal to a special post allowance (SPA) to the D-1 level for the period from 1 April 1991 until the date of the Applicant's separation from service. Although the Applicant's retirement was originally scheduled to occur on 31 October 1992, his appointment was extended for three months until 31 January 1993.

II. The Applicant asks for a retroactive promotion to the D-1 level on the ground that, although he was at the P-5 level, he filled the D-1 post in question satisfactorily from late December 1990 until his separation. The Applicant had applied for the post

prior to being assigned thereto, along with 14 other candidates, in response to a vacancy announcement having a deadline of 10 September 1990. After the Applicant had been assigned, in an acting capacity, to the post, the then Executive Secretary of ECA decided that none of the candidates responding to the vacancy announcement was qualified. He asked that the post be readvertised, inter alia, so as to attract a qualified female candidate. This was apparently in keeping with ST/ECA/IC/90/43 dated 10 June 1990, which dealt with measures to increase the recruitment of women for high level posts. A new vacancy announcement was circulated with a deadline of 29 July 1991 and in August of that year, OHRM forwarded to ECA the applications of 24 candidates it deemed qualified for the D-1 post.

III. During the latter part of 1991, consideration appears to have been given to a possible restructuring of ECA which might have resulted, had it occurred, in a redeployment of the D-1 post in question. Before a decision was made regarding possible restructuring, the applications of eight of the candidates seeking the post were submitted to the Acting Executive Secretary who had succeeded the prior Executive Secretary. This occurred in early December 1991. On 23 March 1992, the Acting Executive Secretary inquired of the Administration and Conference Services Division as to whether there would be any difficulty in selecting the Applicant to fill the post. Presumably, this inquiry was motivated by the Acting Executive Secretary having concluded that the Applicant, who had filled the post satisfactorily for about two years, was the best qualified of the various candidates. In fact, the Acting Executive Secretary had received, about a month before, a recommendation from an Ad Hoc Committee on Professional Staff Careers, that the Applicant should be promoted to the vacant D-1 post.

IV. However, on 29 April 1992, the Acting Executive Secretary was advised by the ECA Administration that, pursuant to the policy set forth in a Manual for Appointment and Promotion Committees at

Offices Away from Headquarters, promotions should not be granted within a few months of a staff member's anticipated retirement. As a result of this and the restructuring, the Applicant was not promoted.

V. In view of the Tribunal's consistent jurisprudence holding that its review of discretionary decisions with respect to promotion is extremely limited, the Tribunal is unable to conclude that the Respondent's decision not to promote the Applicant retroactively was flawed. There was no wrongful motivation or mistake involved. On the contrary, the decision not to make an end-of-career promotion was premised on a rational policy expressed in the Manual referred to above. As the ILOAT recently said in a similar situation:

> "... promotion is at the discretion of the Organisation, which must be free to grant or withhold it in accordance with objective working requirements. It follows that any grant of promotion at the time of retirement is inherently contrary to the Organisation's interests because by then there can no longer be any question of taking on the higher level of responsibility that promotion entails. The Tribunal therefore holds that the Organisation is right to follow the policy of refusing its staff promotion which would have the sole effect of laying a burden of social costs on the institution as a whole without conferring on it any benefit in return." In re Heritier, ILOAT Judgment No. 1388 (1995).

The Applicant's plea for a retroactive promotion therefore fails.

VI. Notwithstanding the lack of entitlement to a retroactive promotion, an element of unfairness is present in the treatment accorded the Applicant. This was not adequately remedied by the grant of an SPA to him, to which he seemed otherwise plainly entitled. The unfairness consisted of letting nine months elapse after readvertisement of the D-1 vacancy without selecting the best qualified candidate, who evidently was the Applicant. This turned out to be quite harmful to the Applicant because, by the time the group of those with the best qualifications was submitted to the Acting Executive Secretary, the potential restructuring had come under consideration. This delayed even further the filling of the

D-1 post. By the time these matters were resolved, the Applicant was close enough to retirement to cause his likely promotion to the D-1 level to fall by the wayside. In the circumstances of the harm to the Applicant caused by undue delay, he is entitled to compensation which the Tribunal fixes at $7,000.

VI. In view of the foregoing, the Tribunal orders the Respondent to pay the Applicant $7,000.

All other pleas are rejected.

(Signatures)

Jerome ACKERMAN
President

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/691
21 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 691

Case No. 778: ITTAH

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman; President; Mr. Mikuin Leliel Balanda; Mr. Mayer Gabay;

Whereas, on 15 December 1993, Haim Ittah, a staff member of the International Civil Aviation Organization, hereinafter referred to as ICAO, filed an application requesting the Tribunal:

"...

11. On the merits, ...

(a) To find that the rejection by the Secretary General of ICAO of the recommendation of the ICAO Advisory Joint Appeals Board that the delay in filing an appeal be waived was unreasonable...;

(b) To find that the refusal of the Secretary General to agree that the appeal be submitted directly to the United Nations Administrative Tribunal was a denial of the Applicant's right to recourse;

(c) To order the hearing of the formally presented appeal by the Advisory Joint Appeals Board...; or,

(d) ..., to decide that the appeal refused by the Secretary General of ICAO shall be receivable before the Tribunal."

Whereas the Respondent filed his answer on 30 June 1994;

Whereas the Applicant filed written observations on 19 August 1994;

Whereas, on 25 May 1995, the President of the Tribunal, pursuant to article 10 of the Rules of the Tribunal, put questions to the Respondent, to which he provided answers on 31 May 1995;

Whereas, on 30 June 1995, the Applicant commented on the Respondent's submission;

Whereas, on 6 July 1995, the President of the Tribunal ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of ICAO on 21 September 1965, on a temporary appointment, and served thereafter on a series of fixed-term appointments until 10 March 1969, when he resigned from the Organization. The Applicant re-entered the service of ICAO on 1 November 1971, as a Draughtsman in the Central Typing Unit, Bureau of Administration and Services, on a temporary appointment, at the G-3 level. He served on a series of further appointments in different posts and on 20 May 1975, his appointment became permanent. During the course of his employment, he received successive promotions.

On 16 June 1979, the Applicant was appointed Technical Assistant in the Aeronautical Information Unit, Aeronautical Information and Charts Section (AIS/MAP). The post was at the G-8 level and the Applicant received a promotion to that grade.

With effect from 2 April 1986, the Applicant was temporarily assigned, at the P-2 level, to the AIS/MAP Section. He was paid a special post allowance (SPA) at that level, with effect from 2 July 1986, as he had "been carrying out many of the responsibilities of the [P-3 Supervisor, Information Services post] since ... 2 April 1986, in addition to fulfilling the functions of his own post". With effect from 1 May 1987, the Applicant was paid the SPA at the P-3 level, until 26 May 1991, when he reverted to the G-8 level.

In October 1986, the Applicant applied for three professional posts, noting that he was "the acting incumbent of the post of Supervisor, Information Services (AIS) [P-3] since 2 April 1986." In a letter dated 10 April 1987, the Chief, Recruitment and Placement Section, informed the Applicant that it had been decided to defer filling the post for some time on account of the implementation of certain economic measures. He added: "As soon as a decision is taken to resume the process of filling the post, we will contact you in order to ensure that you would still be available as an interested candidate."

On 28 February 1989, the Chief, Recruitment and Placement Section, informed the Applicant that the Administration was in the process of reactivating recruitment for the post he was encumbering and had decided to readvertise it. A new vacancy notice would be issued and the Applicant was asked whether he wished to be listed as a candidate for the post. In a memorandum dated 13 October 1989, to the Chief, Recruitment and Placement Section, the Applicant applied for the post describing the experience he had acquired as the "acting incumbent" of the post since 2 April 1986. He stated in that memorandum: "For the record, I wish to state that I am a citizen of Morocco." On 27 October 1989, the Chief, Recruitment and Placement Section, informed the Applicant that his application would be considered and asked him to ensure that "... a complete and up-to-date application form is available to REC [Recruitment] for presentation to the Board. Please do not refer to application forms or information submitted for other posts." According to the record, the Applicant did not submit a new application. On 25 March 1991, the Chief, Recruitment and Placement Section, informed the Applicant that he had not been selected for the post.

On 3 May 1991, the Applicant met with the Secretary General. On the same date, he wrote to him, recalling that he had fulfilled the duties of the post over the previous five years and requesting an explanation for his non-appointment to the post. In a reply dated 17 May 1991, the Secretary General informed the Applicant as follows:

> "Please refer to your memorandum of 3 May 1991 on the above subject. I can assure you that your candidature for the post in question has been given very thorough consideration by the Appointments and Promotion Board and myself. After having taken all relevant factors into account, based on the criteria provided for by staff regulation 4.1, I decided to appoint another candidate to this post."

On 21 May 1991, the Applicant requested the Secretary General to review that administrative decision. In a further memorandum dated 22 May 1991, the Applicant asked the Secretary General for a retroactive temporary promotion to the P-3 level, to enhance his pension rights. On 18 June 1991, the Chief, Personnel Branch, wrote to the Applicant, on behalf of the Secretary General, reiterating that his candidature for the post had been considered by the Appointment and Promotion Board, but that the Secretary General had decided to appoint another candidate. He also rejected the Applicant's request for a retroactive promotion. In the meanwhile, the Applicant suffered ill health and was on sick leave from 29 May until 19 August 1991.

On 31 July 1991, while the Applicant was on sick leave, the Secretary General's term of office expired. When the Applicant resumed his duties in August 1991, he asked for an interview with the successor Secretary General to discuss his employment and reiterate his request for an explanation for his non-appointment to the post. According to the Applicant, the new Secretary General promised to look into the matter, and some two weeks later informed the Applicant, by message, that he would postpone consideration of the matter until the question of the Applicant's nationality had been resolved.

On 15 April 1992, the Applicant wrote to the Secretary General, asking for a written response to his request of 21 May 1991, to review the administrative decision not to appoint him to the post. He recalled the alleged statement by the Secretary General that he would postpone consideration of the matter, pending resolution of the question concerning the Applicant's nationality.

On 13 May 1992, the Applicant lodged an appeal with the Advisory Joint Appeals Board (AJAB). In a memorandum dated 17 May 1993, the Chairman of the AJAB communicated to the Secretary General its recommendation as follows:

> "... the Board carefully reviewed all the relevant facts and circumstances associated with the filing of the appeal, including the fact that [the Applicant] had been on sick leave from 29 May 1991 to 19 August 1991, and that there had been continuing discussions with you on this subject. Taking into account also that the timing of the appeal is not in itself relevant to the substance of the case, the Board unanimously recommends that you exercise your discretionary power and waive the time limit prescribed in [ICAO] staff rule 111.1.6."

On 11 June 1993, the Chairman of the AJAB informed the Applicant as follows:

> "...
>
> I regret to inform you that I was advised by memorandum dated 10 June 1993 from the Secretary General that he did not 'recognize any exceptional circumstances in this case and [does] not agree to waive the delay.' Consequently, the Advisory Joint Appeals Board does not have the competence to hear this case."

On 15 December 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The delay in filing the appeal was due to the Applicant's understanding that the Secretary General would not consider the Applicant's request for administrative review until questions concerning his nationality had been resolved.

2. The refusal by the Secretary General to waive the time limit was arbitrary and unjust in that he did not advance any argument to the AJAB to justify his refusal to accept the AJAB's recommendation.

Whereas the Respondent's principal contentions are:

1. The Applicant was cognizant of all relevant ICAO regulations when he elected to delay his appeal before the AJAB.

2. The decision not to waive the time-limit referred to in ICAO staff rule 111.1.6 did not constitute an abuse of power.

The Tribunal, having deliberated from 6 to 21 July 1995, now pronounces the following judgement:

I. On 25 March 1991, the Applicant was notified that he had been unsuccessful in his candidacy for appointment to the P-3 post he had filled temporarily for a lengthy period. On 3 May 1991, he discussed this with the Secretary General and on the same date, he wrote to the Secretary General asking for an explanation as to why he had not been appointed to the post. By an inter-office memorandum dated 17 May 1991, the Secretary General responded, informing the Applicant that his candidature had been given thorough consideration by the Appointment and Promotion Board and by himself. After considering all relevant factors, he had decided to appoint another candidate.

II. The Applicant obviously understood this to be a formal decision since, by a letter to the Secretary General dated 21 May 1991, he asked him to review it. This is the procedure called for by staff rule 111.5. If the staff member receives no reply to his or her request for review within two weeks, from the date of receipt by the Secretary General of the request for review, he or she must submit an appeal within the two following weeks. Staff rule 111.6 provides that, if the staff member receives a reply and wishes to appeal a decision by the Secretary General, his or her appeal must be submitted to the AJAB within two weeks from the date of its receipt. Staff rule 111.7 provides that a staff member who fails to observe these time limits "shall lose the right to appeal, unless the delay is waived ..." by the Secretary General.

III. The Applicant takes the position that the Secretary General did not respond to the request for review dated 21 May 1991, but responded only to another request sent by the Applicant the day after the request for review, i.e., 22 May 1991. In the latter request, the Applicant -- also in the form of an inter-office memorandum -- asked for reconsideration of an earlier request for a temporary promotion to the P-3 level, with effect from 2 April 1987, under ICAO staff rule 103.18. By inter-office memorandum dated 18 June 1991, the Applicant received a reply to his inter-office memorandum to the Secretary General dated 22 May 1991.

IV. This latter reply, though directed to the memorandum of 22 May 1991, is also susceptible of being read as a reiteration of the rejection of the Applicant's candidature for the post previously referred to, as well as a refusal to promote the Applicant temporarily to the P-3 level. Be that as it may, the Applicant took no further action with respect to his request for a temporary promotion and, until 13 May 1992, did not seek to appeal further with regard to the appointment of an external candidate, rather than himself, to the post referred to in the 17 May 1991 communication from the Secretary General. The Tribunal notes that the Applicant was on sick leave from shortly after 22 May 1991 until 19 August 1991. In short, the Applicant made no submission to the AJAB until long after the expiration of the time limit.

V. The Applicant subsequently asked that the AJAB recommend to the Secretary General that, under the circumstances, the time limit be waived. The AJAB so recommended but a new Secretary General, the successor to the Secretary General who had written the letter dated 17 May 1991, declined to accept the AJAB recommendation. The Applicant appeals from that decision to the Tribunal.

VI. As the Tribunal has previously held, when the Respondent decides whether or not to waive the time-bar with respect to an appeal, "... he exercises discretionary power within the limits set

by the case law of the Tribunal - errors of fact or law, partiality, arbitrariness and discrimination. It is for the Applicant to show that ... refusal to waive the time-bar is tainted by one of these defects." (Cf. Judgement No. 527, Han, paragraph XIV (1991)).

VII. The Applicant bases his case on two arguments. First, he asserts that the delay in filing his appeal stemmed from his understanding that the successor Secretary General was not going to consider the Applicant's request for review until the question of his nationality had been resolved. The Secretary General denied having so indicated to the Applicant. Subsequently, the Applicant modified his contention by asserting that it was not the Secretary General who had so indicated but his secretary, in a telephone conversation. In that conversation, which occurred some time after the Applicant and the Secretary General had met on 21 August 1991, the Secretary General's secretary is alleged to have made, at his direction, the statement originally ascribed by the Applicant to the Secretary General. By letters dated 13 August 1993 and 14 September 1993 to the Applicant, the Secretary General informed him that neither he nor his secretary recalled having made such a statement. The Tribunal is unable to conclude from the foregoing that the Applicant understood that action on his request for review was being deferred.

VIII. The Applicant's second argument is that the refusal of the Secretary General to waive the time limit was arbitrary and unjust in that he did not submit comments or advance any argument against the waiver before the AJAB. This contention is without merit. Indeed, the Chairman of the AJAB informed the Applicant that "No comments are sought or provided for preliminary matters such as a recommendation on the waiver of time limits." It is therefore not surprising that the Secretary General submitted none. It is for him to decide what, if any, submission he wishes to make to an Advisory Joint Appeals Board. Although it might perhaps have been desirable for the Secretary General, before receiving the recommendation of

the AJAB, to have provided the AJAB with the reasons for his unwillingness to waive the time bar, the Tribunal does not consider this as tantamount to an arbitrary refusal to waive the time bar. The Secretary General was, of course, aware that it was within his discretion to accept or reject the recommendations of the AJAB. In the view of the Tribunal, the test of arbitrariness relates to the reasons for unwillingness to waive a time-bar far more than to when they are given. The Secretary General subsequently notified the AJAB that he saw no exceptional circumstances warranting waiver of the time bar.

IX. The Applicant also claims that, as late as 8 December 1993, the Secretary General in the presence of another official of the Organization, confirmed, contrary to earlier denials, that he had directly and/or indirectly communicated to the Applicant that the Applicant's 21 May 1991 request for review would be considered after the issue relating to his nationality had been resolved. In response to a request for information by the Tribunal concerning this allegation, the Secretary General, by a letter dated 31 May 1995, reiterated his previous denials. In addition, the Applicant's counsel, who was present at the 8 December 1993 meeting, has acknowledged the correctness of the statement by the Secretary General in response to the Tribunal's information request.

Finally, the Applicant makes the point that he was not apprised of available recourse in accordance with the last sentence of staff rule 111.1.2, which provides:

> "When informing a staff member following either review or appeal action, the Secretary General shall, where appropriate, advise the staff member as to possible further recourse actions."

The Tribunal does not consider the quoted language to be of material relevance since the rule leaves it to the Secretary General to determine whether such advice is appropriate. The Tribunal notes that the time-bar here did not result from an untimely appeal of a

response to a request for review or appeal. It resulted from an untimely appeal following absence of a reply by the Secretary General within the proscribed period to a request for review. Hence, there was no occasion for the Secretary General to determine whether it was appropriate to advise the staff member as provided in the quoted sentence.

X. In view of the foregoing and the absence of any showing of errors of fact or law, partiality, arbitrariness or discrimination, the Tribunal considers that the Respondent's decision was within his discretionary authority. In this regard, the Tribunal notes that the Secretary General explained to the Chairman of the AJAB his rejection of the recommended waiver on the ground that the challenged decision regarding appointment to the post sought by the Applicant had been taken by his predecessor, based on the latter's and the APB's evaluation of the candidates, and that the Applicant was so informed. The successor Secretary General stated that he did not recognize any exceptional circumstances in the case.

XI. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Mikuin Leliel BALANDA
Member

Mayer GABAY
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

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21 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 692

Case No. 753: WHITE
754: LE STER
755: MAROUF
756: BEN FADHEL
757: DODINO
758: ATAR

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas at the request of Michael White, Antoinette Le Ster, Louay Marouf, Omar Farouk Ben Fadhel, Victor Dodino, and Nicole Atar, staff members of the International Maritime Organization, hereinafter referred to as IMO, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of an application to the Tribunal to 31 July 1993 and 31 October 1993;

Whereas, on 27 August 1993, the Applicants filed applications requesting the Tribunal:

"1. ... to rule:

(a) That, since the Applicant[s] participation in the work stoppage at IMO on 6 November 1992 was an absence from duty not specifically covered by other provisions of the Staff Rules, the proper administrative response was that prescribed in staff rule 105.1(d), namely the deduction of annual leave for the period of absence from duty;

(b) That the Respondent erred in treating the absence due to a work stoppage in a manner different from that prescribed in staff rule 105.1(d);

(c) That the deduction of salary for the period in question was a disguised disciplinary sanction and was contrary to the Staff Rules and therefore constituted an infringement of the Applicant[s]' terms of appointment.

2. The Tribunal is further requested to order the Respondent to repay to the Applicant the amount deducted from [their] salar[ies] in respect of the work stoppage."

Whereas the Respondent filed his answers on 23 February 1994;

Whereas the Applicants filed written observations on 30 November 1994;

Whereas the Respondent filed observations on the Applicants' written observations on 9 February 1995;

Whereas the Applicants filed additional observations on 23 March 1995;

Whereas the facts in the case are as follows:

The Applicants entered the service of IMO on different dates, between 1 July 1976 and 18 August 1988. The Applicant White retired from IMO on 31 August 1993.

On 13 October 1992, the President of the IMO Staff Assembly convened an extraordinary meeting of the Staff Association to consider the recommendations made by the Federation of International Civil Servants' Associations (FICSA) of which the IMO Staff Association was an affiliate. The recommendations were that each staff association should send members to the meeting of the Fifth Committee of the United Nations General Assembly in New York, that there should be work stoppages and a mass lunch-time walkout to protest impending action by the Fifth Committee, perceived to be inimical to the conditions of service of staff within the United Nations common system. The IMO Staff Assembly supported the FICSA recommendations and provisionally scheduled a one-half day work stoppage for Friday morning, 6 November 1992.

In a memorandum dated 30 October 1992, the Staff Committee advised all staff members that a work stoppage would be held Friday morning, 6 November 1992. It reminded the staff that "a half day's pay may be deducted from their salaries" if they participated. In a memorandum dated 4 November 1992, the Director, Administrative Division, advised all Directors that this reminder was not correct and that "the Administration will (not 'may') deduct a half a day's pay from salaries in respect of staff members who absent themselves, without leave, for the period in question." In a memorandum dated 5 November 1992, he similarly advised the Chairman, Staff Committee.

On 6 November 1992, a number of IMO staff members, including the Applicants, took part in the work stoppage. In a memorandum dated 11 November 1992, the Chairman, Staff Committee, informed the Director, Administrative Division, inter alia:

> "In connection with your intention to deduct half a day's pay from salaries in respect of staff members participating in the work stoppage last Friday, the Staff Committee wishes to point out that the action to be taken is specified in staff rule 105.1(d) which states that any absence from duty not specifically covered by other provisions of the Staff Rules shall be charged to the staff member's accrued annual leave, if any. Only if a staff member has no accrued annual leave is such absence considered as unauthorized, in which case pay and allowances are deducted for the period of absence.
>
> Several members of the Staff Association ... have indicated their concern at your apparent intention of dealing with the situation in a manner which differs from what is prescribed in the Staff Rules.
>
> The position taken by some members of the Staff Committee during their meeting with you, in which a preference for deductions from salary was expressed, did not fully take these considerations into account."

In a reply dated 19 November 1992, the Director, Administrative Division reaffirmed the Administration's position. He stated, inter alia, "that there is no basis on which to pay a staff member who engages in strike action, work stoppage, or who for

any other reason is absent without authorization. It therefore follows that the staff rule to which you refer (105.1(d)) is not relevant in this respect."

In memoranda to the Applicants White, Le Ster, Ben Fadhel and Atar, dated 4 December 1992, and to the Applicants Marouf and Dodino, dated 15 December 1992, the Director, Administrative Division, advised the Applicants that their "salary payment for the month of December will be reduced by one half-day's pay, on account of your unauthorized absence from duty on the morning of 6 November 1992." He noted that an argument had been made by the President of the Staff Association that the provisions of staff rule 105.1(d) should be applied to allow for the reduction of annual leave rather than deduction from pay for the absence. He explained that this rule applied only to leave "taken when authorized," and stated "it is a fact that your absence was not authorized by your supervisor."

In memoranda, dated 14 December 1992 from the Applicants White and Le Ster, 15 December 1992 from the Applicant Atar, 17 December 1992 from the Applicants Ben Fadhel and Dodino, and 20 January 1993 from the Applicant Marouf, the Applicants requested the Secretary-General to review the administrative decision not to apply staff rule 105.1(d) to the absence from duty occasioned by the work stoppage. In replies dated 18 January or 2 February 1993, the Secretary-General advised the Applicants that "correct action was taken by the Administrative Division and entirely appropriate to the circumstances."

In a memorandum dated 26 February 1993, the Applicant White advised the Deputy Director, Administrative Division, that he had been asked to represent the Applicants in an appeal to the Joint Appeals Board. He noted that they would agree to direct submission of the matter to the Tribunal. In a reply dated 14 April 1993, the Director, Administrative Division, stated "I am in a position to confirm that the Secretary-General considers it would be appropriate in this instance for the appeals of the staff concerned to be submitted directly to the United Nations Administrative Tribunal."

On 27 August 1993, the Applicants filed with the Tribunal the application referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Applicants' absence due to participation in the work stoppage is an absence covered by staff rule 105.1(d), and annual leave should be deducted for the absence, rather than pay.

2. Deduction of pay is a disguised disciplinary sanction against those staff members who participated in the work stoppage.

Whereas the Respondent's principal contentions are:

1. Staff rule 105.1(d) applies only to authorized absences not otherwise provided for in the Staff Rules. It is not applicable to work stoppages, which should be governed by general principles of international law.

2. The intention of the Respondent, to deduct pay for staff members who participated in the work stoppage without authorized leave or take out, was communicated to and endorsed by the Staff Committee representatives at a meeting prior to the action and was made clear to all staff.

The Tribunal, having deliberated from 4 to 21 July 1995, now pronounces the following judgement:

I. The Tribunal orders that there be a joinder in this case of all the applications.

The provisions of the rule which is central to the Applicants' cases are as follows: staff rule 105.1(d) "Any absence from duty not specifically covered by other provisions in these rules shall be charged to the staff member's accrued annual leave, if any; if the staff member has no accrued annual leave, it shall be considered as unauthorized and pay and allowances shall cease for the period of such absence."

The Applicants were absent from duty for a half day on 6 November 1992. Subsequently, because of such absence, a half day's pay was deducted from their salary. Their absence from duty arose from their participation in a work stoppage that was part of a system-wide campaign by staff representative bodies.

II. The Applicants take exception to this treatment, on the ground, first of all, that since their participation in the work stoppage was an absence from duty not specifically covered by other provisions of the Staff Rules, the proper administrative response should have been that prescribed in staff rule 105.1(d), namely the deduction of annual leave for the period of absence. The further ground put forward by the Applicants is that the deduction of salary was not only contrary to the staff rule but a disguised disciplinary sanction and so constituted an infringement of the Applicants' terms of appointment.

III. The Applicants say that strikes could not be considered to be illegal and could not, in principle, result in disciplinary action; that the Administration could properly deduct annual leave for the period of the strike under staff rule 105.1(d), and only if the staff member concerned had no accrued annual leave could pay be withheld for the period of "unauthorized absence".

The Applicants contend that the meaning of staff rule 105.1(d) can scarcely be in doubt. The first part of the sentence prescribes the action to be taken in the case of absence from duty not otherwise covered by the Staff Rules where the staff member has an accrued leave balance to his or her credit (the appropriate action being the deduction of annual leave), while the second part prescribes the withholding of pay and allowances, but only in the case of staff members who have no accrued annual leave. As the Applicants had annual leave to their credit at the time, they wished to benefit from the staff rule and have their annual leave, rather than their salary, deducted for the absence.

IV. The Applicants refer to the memorandum of 4 December 1992, from the Director of the Administrative Division, in which he says that the situation in international law governing the employment of international civil servants in circumstances of a work stoppage or strike is that their salary is "generally payable only for services rendered." Therefore, he says, "there is no basis on which to pay a staff member who engages in strike action, work stoppage, or who for any other reason is absent without authorization." He contends that leave may only be taken when authorized under staff rule 105.1(d). As the Applicants' absences were not authorized by their supervisor, it would not be proper to treat them on the same basis as those of staff members who applied for and were granted annual leave.

While the Applicants do not deny the general principle invoked by the Director of the Administrative Division, that payment is not due for services not rendered, they say that it offends another principle, i.e. that an authority is bound by its own rules until such time as it has altered or abrogated them.

V. It is necessary therefore to examine the wording of staff rule 105.1(d). On the face of it, the interpretation adopted by the Applicants does appear to have validity if one looks at that rule in isolation. It does seem to give the Applicants, as persons who have accrued annual leave, the right to have the absence charged against such annual leave.

However, the interpretation of staff rule 105.1(d), taken in isolation, is not adequate for our purpose. The rule should be looked at in context. It appears under the heading "Annual Leave" and it is preceded by the words contained in staff rule 105.1(b) "Leave may be taken only when authorized". On perusing all of staff rule 105.1, the Tribunal considers that it would be unrealistic to suggest that this stricture does not also apply to the absence from duty referred to in staff rule 105.1(d).

VI. What is the position then when absence from duty is unauthorized? Clearly it was never intended that such unauthorized leave would simply be followed by a deduction in the staff member's annual leave. It is in this context that the Administration's action in deducting pay must be examined. This is what the Applicants invite the Tribunal to do. On the basis of staff rule 105.1(d), looked at in the context of the entire staff rule 105.1, the Respondent cannot be faulted for acting as he did even though the specific wording of the rule may be regarded as ambiguous. For this reason, the Tribunal finds that the deduction of salary cannot be regarded as a disguised disciplinary sanction.

VII. There are other matters to be considered. The Applicants make reference to the action taken by the Respondent following the London Transport strike on 2 April 1993. They ask for the rationale on the distinction made by the Director of the Administrative Division between staff who did not come to work on 6 November 1992, because they were participating in the work stoppage, and staff who could not provide a satisfactory explanation for their absence from duty on 2 April 1993, the day of the London Transport strike. The Applicants are referring to the fact that the annual leave balance of staff who failed to provide an adequate explanation for their failure to come to work was debited. While the Tribunal appreciates that the Applicants can detect similarities in the two situations, it is of the view that conclusions should not be drawn from a situation which is scarcely analogous to that which obtained on 6 November 1992. The strike in April 1993 was between parties other than staff members. The Tribunal accepts the distinction made by the Respondent between the participants in the work stoppage of 6 November 1992, who had control of their actions, and the staff members affected by the London Transport strike. As the Respondent points out, in those circumstances, IMO staff members who did provide satisfactory explanation were granted special leave with pay.

VIII. Another matter raised in these cases concerns a meeting with the Director of the Administrative Division and other representatives of the IMO Administration and Representatives of the IMO Staff Committee on 26 October 1992. The Administration's position was that absence without leave in connection with the work stoppage would be deducted from pay rather than from annual leave and the Staff Committee Representatives endorsed the pay deduction. The Applicants, subsequent to the work stoppage, stated in a memorandum that the Staff Committee Representatives did not take all the relevant factors into account.

After the meeting of 26 October 1992, a circular dated 30 October 1992 (before the work stoppage) from the Staff Committee stated that pay "may" be deducted. By memorandum of 4 November 1992 (also before the work stoppage), the Director, Administrative Division, said that deduction would be made from salaries.

IX. Because of its finding in relation to staff rule 105.1, which is decisive in the case, the Tribunal need go no further in relation to the endorsement at the meeting of 26 October 1992, by the Staff Committee Representatives, of the course of action proposed by the Administration, than to note the implied acceptance by the Staff Committee of the proposed deduction of pay from salary, now defended by the Respondent. The Committee was afforded an opportunity to discuss the interpretation of staff rule 105.1(d), and to put forward the point of view now presented by the Applicants prior to the work stoppage, but this was not done.

X. The Tribunal recalls the position adopted in Smith (Judgement No. 249 (1975)) in which it held:

> "... that staff regulation 1.2 provides that 'the whole time of staff members shall be at the disposal of the Secretary-General. The Secretary-General shall establish a normal working week'. ... It is therefore apparent that 'work' is the fundamental obligation of staff members. Receipt of salary is, moreover, the essential counterpart to work performed. ...

The unauthorized absence from work or attendance at the place of work while failing to perform duties removes the basis for payment of salary."

The Respondent submits that, as in this case, the relevant UN Rules in that case were silent on the matter of wor . stoppages, yet in Smith it was recognized that there is no general principle of law to provide any entitlement to pay for a period during which an employee did not work.

The Tribunal cannot find that the IMO staff rule applies to work stoppages. Rather, the Tribunal finds that leave can be taken only when authorized and, in the circumstances, therefore it is proper that the unauthorized leave of 6 November 1992 was followed by deduction of salary.

XI. The Tribunal therefore rejects the Applicants' pleas.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/693
21 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 693

Case No. 745: NUÑEZ
No. 746: TRAINI

Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Hubert Thierry; Mr. Mayer Gabay;

Whereas at the request of Luis Nuñez and Fabio Traini, staff members of the International Maritime Organization, hereinafter referred to as IMO, the President of the Tribunal, with the agreement of the Respondent, successively extended the time-limit for the filing of applications to the Tribunal to 15 April, 15 July and 15 October 1992, 15 January, 15 May and 31 August 1993;

Whereas, on 29 July 1993, the Applicants filed applications requesting the Tribunal:

"1. To declare itself competent in this case;

2. To rule:

(a) That the employment of the Applicant[s] as a full-time member of the Secretariat of the International Maritime Organization (IMO) on terms other than the Staff Regulations of the Organization was contrary to the provisions of the Convention on the International Maritime Organization (the IMO Convention) concerning the staffing of the Secretariat;

(b) That the Respondent had no authority to impose on the Applicant[s] conditions of service other than those envisaged in the IMO Convention and that the

Staff Regulations must therefore be deemed to apply to the Applicant[s];

(c) That the denial to the Applicant [Nuñez] of rights under the Staff Regulations on the grounds that he is not a 'staff member' has no legal justification, particularly in view of the fact that the Applicant is a participant in the United Nations Joint Staff Pension Fund and has therefore been declared to the Pension Fund Secretariat, under article 21(a) of the Regulations of the Fund, as a 'full-time member of the staff' of the Organization;

That the denial to the Applicant [Traini] of rights under the Staff Regulations during the period when he was employed on supernumerary contracts on the grounds that he was not a 'staff member' has no legal justification, particularly in view of the fact that the Applicant became a participant in the United Nations Joint Staff Pension Fund during the period and had therefore been declared to the Pension Fund Secretariat, under article 21(a) of the Regulations of the Fund, as a 'full-time member of the staff' of the Organization;

(d) That the Staff Rules must be deemed to apply to the Applicant [Nuñez] as they do to staff members on fixed-term appointments;

That the Staff Rules must be deemed to have applied to the Applicant [Traini] when he was employed on supernumerary contracts as they do to staff members on fixed-term appointments;

(e) That the Applicant [Nuñez] is therefore entitled to be put on a par with staff members on fixed-term appointments with regard to entitlements under the Staff Regulations and Staff Rules from a date to be determined by the Tribunal which shall be either the beginning of the period of service that he was said to be entitled to validate for Pension Fund purposes, or the date on which his actual participation in the Pension Fund commenced;

That the Applicant [Traini] was therefore entitled, during the period in question, to be put on a par with staff members on fixed-term appointments with regard to entitlements under the Staff Regulations and Staff Rules from a date to be determined by the Tribunal which shall be either the beginning of his period of continuous service with IMO (22 January

1986) or the date on which his participation in the Pension Fund commenced (1 August 1986);

3. To order the Respondent to accord to the Applicant [Nuñez] all the rights due to a staff member holding a fixed-term appointment under the Staff Regulations and Staff Rules with effect from the date of the judgement;

To rule that the Respondent erred in not according to the Applicant [Traini] all the rights due to a staff member holding a fixed-term appointment under the Staff Regulations and Staff Rules from the date determined by the Tribunal under paragraph 2(e) above to the date when he received a probationary appointment;

4. To order the Respondent to make good the injury suffered by the Applicant [Nuñez] as a result of the denial of those rights in the past, as follows:

(a) By paying to the Applicant [Nuñez], in respect of quantifiable entitlements, including, but not limited to, the right to receive a dependency allowance in respect of his son, the full monetary value of the entitlements withheld between the date determined by the Tribunal for backdating under paragraph 2(e) above and the date of the judgement, together with interest calculated at the average rate of interest received by IMO on its deposit accounts reckoned from the date when the entitlements became due;

(b) In respect of unquantifiable losses and moral injury, 10 per cent of the monthly salary paid to the Applicant [Nuñez] as a supernumerary employee between the date determined by the Tribunal for purposes of backdating under paragraph 2(e) above and the date of the judgement, together with interest calculated on the basis specified in subparagraph (a) above.

To order the Respondent to make good the injury suffered by the Applicant [Traini] as a result of the denial of those rights, as follows:

(a) By paying to the Applicant [Traini], in respect of quantifiable entitlements, including, but not limited to, the right to receive a dependency allowance and a special education grant in respect of his daughters, the full monetary value of the entitlements withheld between the date determined by the Tribunal for backdating under paragraph 2(e) above and the date when he received a probationary

appointment, together with interest calculated at the average rate of interest received by IMO on its deposit accounts reckoned from the date when the entitlements became due;

(b) In respect of unquantifiable losses and moral injury, 10 per cent of the monthly salary paid to the Applicant [Traini] as a supernumerary employee between the date determined by the Tribunal for purposes of backdating under paragraph 2(e) above and the date when the Applicant was recognized as a staff member and therefore as having entitlements under the Staff Regulations and Staff Rules, together with interest calculated on the basis specified in subparagraph (a) above."

Whereas the Respondent filed his answers on 27 June 1994;

Whereas the Applicants filed written observations on 17 February 1995;

Whereas, on 23 March 1995, Tobias Nehmy Neto filed an application for intervention, under article 19 of the Rules of the Tribunal;

Whereas, on 28 June 1995, the Respondent filed observations on the application for intervention, and submitted an additional document;

Whereas, on 3 July 1995, the Applicants filed observations on the Respondent's observations on the application for intervention;

Whereas the facts in the case are as follows:

The Applicant Nuñez entered the service of IMO as a porter pursuant to a 15 day temporary assistance supernumerary contract, from 25 October through 12 November 1982. Thereafter, the Applicant continued to serve IMO, alternately as a porter and as a messenger from November 1982 to April 1984, pursuant to a substantially unbroken sequence of 27 supernumerary appointment contracts, 26 of which were paid on a "per day" basis and one of which was a monthly contract for a one month period. From April through June 1984 and from October 1984 through January 1990, the Applicant served the IMO as a messenger in the Technical Cooperation Division (TCD) Registry, pursuant to 22 monthly temporary assistance supernumerary

appointments, ranging in duration from one to seven months. From 1 February 1990 through 31 May 1992, pursuant to 8 successive monthly supernumerary contracts, the Applicant Nuñez served in the Field Procurement Section of the Administrative Division. The Applicant Nuñez continued to be employed pursuant to supernumerary appointments on similar terms, until 10 April 1995, when he received a probationary regular appointment to the post of Clerk, G-3, step VII in the Office of General Services, Administrative Division.

The Applicant Traini entered the service of the IMO as a messenger pursuant to an eight day temporary assistance supernumerary contract from 22 January through 31 January 1986. Thereafter, from 1 February 1986 through 31 January 1991, he served as a clerk-typist, pursuant to an unbroken sequence of 28 monthly temporary assistance supernumerary contracts, ranging in duration from one month to seven months. With effect from 1 February 1991, the Applicant was granted a probationary appointment which became permanent with effect from 1 February 1992.

The Applicant Nuñez, on 21 March 1985, and the Applicant Traini, on 22 July 1986, were advised of their eligibility to participate in the United Nations Joint Staff Pension Fund (UNJSPF). On 28 March 1985, the Applicant Nuñez, and on 25 July 1986, the Applicant Traini, signed notes, indicating their acceptance of the changes in the terms and conditions of their appointments to include participation in the UNJSPF.

In a memorandum dated 20 July 1987, the Applicant Nuñez requested the Senior Deputy Director, TCD, to regularize his post. He noted that he had filled the post since September 1984 and that prior thereto it had been filled by a succession of supernumerary employees, indicating "a real and continuing need" for the post. He pointed out that under the terms of his contract he appeared to not be entitled to medical insurance and to the single parent child allowance. This memorandum was forwarded to the Head of the Personnel Section, with a handwritten note as follows: "For

favourable consideration. If he cannot be compensated for child allowance, perhaps something else could be consider[ed] e.g. higher steps."

In a similar memorandum, dated 22 November 1989, the Applicant Traini requested the Director, TCD, to consider "establishing [this] post on a permanent status". He noted that he had been in the post for four years, and that the short-term and monthly term contracts had created "a very uncertain time" for him. On this memorandum, the Deputy Director, TCD, wrote, "I think that this warrants our looking into with the Administration", and the Director wrote, "I agree. Please follow up." Having received no reply, on 19 February 1990, the Applicant wrote again to the Director, TCD, attaching a description of the duties he had been performing since September 1986. On the memorandum, the Director, TCD, wrote:

> "(1) I think it is essential that the Administration at least acknowledge this request without delay. Please take up with [the Head of the Personnel Section] and tell me what he says.
>
> (2) We can support the request on its merits."

On 7 March 1990, the Head of the Personnel Section advised the Senior Deputy Director, TCD, that "the Administration has been exploring various possibilities of identifying suitable posts for [the Applicant] and a number of other supernumeraries in similar situation. Regrettably, these endeavours have not as yet gained favourable results."

In a memorandum, dated 16 March 1990, the Applicant Traini asked the Director of the Administrative Division to "please let me know what steps are being taken to change the status of my present post to a permanent position." In a reply, handwritten on the memorandum, the Director of the Administrative Division wrote, "I regret that there is no possibility of your present work being made a permanent position for the foreseeable future."

In memoranda to the Director, Administrative Division, dated 23 April 1990 from Applicant Nuñez, and 12 September 1990 from

Applicant Traini, the Applicants each requested dependency allowances, Applicant Nuñez for his son and Applicant Traini for his two children. The Applicants also each requested recognition of their right to all other entitlements under the Staff Regulations and Staff Rules. They noted the position of the IMO Administration that as supernumerary employees, they were not staff members and that therefore the Staff Regulations and Staff Rules did not apply to them. They challenged this interpretation, arguing that as they were not in either of the categories of personnel to which the Staff Rules do not apply, in accordance with staff rule 101.1, the Staff Rules did apply to them and that they were therefore entitled to the corresponding benefits.

In a memorandum to the Applicant Nuñez dated 4 May 1990, and a memorandum to the Applicant Traini dated 13 September 1990, the Head of the Personnel Section rejected the Applicants' requests for entitlements, citing paragraph 21 of their supernumerary contracts, which states "that no allowance or entitlements other than those stipulated therein attach to your appointment."

In a letter dated 30 May 1990, the Applicant Nuñez, and in a letter dated 25 September 1990, the Applicant Traini each requested the Secretary-General to review the administrative decision not to grant him the entitlements he sought. Receiving no reply, the Applicant Nuñez lodged an appeal with the Joint Appeals Board (JAB) on 6 July 1990. In a reply dated 9 October 1990, the Head of the Personnel Section informed the Applicant Traini that the Secretary-General had maintained the contested decision. On 12 October 1990, the Applicant Traini lodged an appeal with the JAB. The JAB considered the Applicants' appeals jointly, and on 29 November 1991, the JAB adopted its report. Its ruling and other observations read, inter alia, as follows:

> "3 Ruling of the Board
>
> The Board is of the unanimous opinion that both appellants are covered by paragraph 6 of Annex 1 to the Staff Rules and Staff Regulations since their salaries are determined in the manner described. It concludes therefore

that regulation 3.3(c) also applies to them and that dependency allowances should be paid.

The Board has not been able to find substantiation for the definition of 'staff member' put forward by Head, Personnel Section and feels that such a definition would be contrary to the IMO Convention.

Article 47 of the IMO Convention, which forms the basis of the Organization's authority to employ staff, states:

> 'The Secretariat shall comprise the Secretary-General and such other personnel as the Organization may require. The Secretary-General shall be the chief administrative officer of the Organization and shall, subject to the provisions of article 22, appoint the above mentioned personnel'.

Article 22 specifies that the Council shall, in particular, determine the terms and conditions of service of the Secretary-General and other personnel ...

The Board holds the opinion that Mr. Nuñez comes under the category 'and such other personnel as the Organization may require' and is, if only implicitly, appointed by the Secretary-General. He would therefore come under the conditions of service as determined by the Council.

It therefore feels that even if rules 101.1 through 111.2 do not apply, the articles do and that the rights (and duties) under the articles should be amplified under the contract.

This leaves the question as to the date from which the payment of dependency allowances should begin.

[Counsel for Applicant], acting on behalf of Mr. Nuñez, in his memorandum of 1 June 1990 to the Secretary-General, puts forward four possible scenarios. However, in the Board's view the fact that a contract was signed by the appellants which clearly states that 'no allowance or entitlement other than those specified in the contract attach to the appointment' weighed heavily. It therefore agreed unanimously that the date from which the emoluments should apply should be the date upon which this clause was challenged.

In the case of Mr. Nuñez this date would be 23 April 1990, for Mr. Traini the applicable date is 25 September 1990.

4 Other observations

During its discussions the Board concentrated solely on interpreting the Staff Regulations and Rules. Nevertheless, it felt strongly that other considerations should not be completely ignored.

In particular, it seems illogical to describe somebody who has worked for the Organization for nine years as a 'temporary' staff member. No matter how the Regulations and Rules are interpreted the Board feels that there is a strong case for granting staff members who have worked for IMO for a number of years similar allowances and privileges to those who have permanent contracts."

On 10 January 1992, the Head of the Personnel Section transmitted a copy of the JAB report to the Applicants and informed them as follows:

"The Secretary-General ... has decided not to accept the Board's recommendation that the appellants be regarded as staff members of IMO ...

The decision is based on the fact that the appellants were offered and accepted supernumerary contracts with clearly defined terms and conditions of employment. ... Therefore, as the appellants were not offered letters of appointment by the Secretary-General in accordance with the applicable provisions of the Staff Regulations and Staff Rules, ..., they cannot be regarded as staff members of the Organization.

..."

On 29 July 1993, the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. The Staff Rules apply to them, pursuant to staff rule 101.1, which only excludes from application of the rules technical assistance project personnel and personnel specifically engaged for conferences and short-term services. The Applicants were not engaged for short-term services.

2. The Secretary-General has no authority to employ staff on a long-term basis, except pursuant to the IMO Convention, which

provides that the Staff Regulations and Rules govern their terms and conditions of service.

Whereas the Respondent's principal contentions are:

1. The interpretation and application of the IMO Convention is outside the scope of the Tribunal's competence, and as the Applicants are not staff members, they are not within the jurisdiction of the Tribunal as defined by article 2 of its Statute. The matter is therefore non-receivable.

2. The supernumerary appointment contracts govern the Applicants' conditions of employment. The Applicants have not alleged non-observance of their contracts of employment. The Staff Regulations and Rules are not applicable to the Applicants.

The Tribunal, having deliberated on 9 November 1994 in New York, and from 4 to 21 July 1995 in Geneva, now pronounces the following judgement:

I. The Applicants in these cases appeal from decisions of the Secretary-General of IMO dated 10 January 1992. By those decisions, the Secretary-General rejected a recommendation of the JAB that the Applicants be paid a dependency allowance under staff regulation 3.3(c). The underpinning for the JAB's recommendation was its conclusion that the Applicants were staff members of the Organization and were therefore entitled to the dependency allowance. The Respondent's reason for declining to accept the JAB recommendation is that the Applicants were not staff members of the Organization at the time in question but were supernumeraries in the employ of the Organization, under short-term contracts which spelled out their entitlements and which made it clear that these did not include payment of a dependency allowance. In keeping with this view of the matter, the Respondent further argues, inter alia, that the appeals are not receivable by the Tribunal because its jurisdiction is limited under article 2(1) of the Tribunal's Statute

to "applications alleging non-observance of contracts of employment of staff members ... or of the terms of appointment of such staff members" (emphasis added). The Respondent also advances a series of arguments addressing each of the Applicants' contentions with respect to their claims of entitlement to the dependency allowance and other employment benefits.

II. The tenor of some of the arguments before the Tribunal suggests that if the Applicants are treated, for any purpose, as though they were staff members, they would, without regard to the language of their contracts of employment, be entitled to a dependency allowance and should be treated for all purposes as though they were indistinguishable from regular employees of the Organization serving under other than supernumerary appointments. The Tribunal, however, does not regard the case in that fashion.

The Tribunal is aware of the Respondent's position that only the issue of dependency allowance is properly before it by virtue of article 7 of the Tribunal's Statute, as well as the Respondent's contentions with regard to timeliness. However, the Tribunal's disposition of these appeals makes those matters moot.

Mindful of the views expressed by the International Court of Justice which are referred to in Judgement No. 628, Shkukani, paragraphs IX and X (1993), the Tribunal has been loath to conclude that persons in the employ of the Organizations subject to its jurisdiction are to be left without any avenue for judicial review of claims arising out of their employment. (Cf. Judgement No. 461, Zafari (1989)).

III. This is particularly true here, where employees have served, albeit under short-term contracts, for lengthy periods and where, unlike the situation in the UN under Special Service Agreements and the situation in UNESCO, there is no explicit contract provision or staff rule that the employee may not be considered a staff member for any purpose. However, merely because the Tribunal may decide under article 2(3) of its Statute that it is competent to consider

an appeal in order to implement the policy objectives enunciated by the International Court of Justice does not necessarily resolve the question of whether the Applicants are entitled to the dependency allowance or other benefits provided to other employees of the Organization. That is an entirely different matter. In the present case, the Tribunal is persuaded, for the above reasons, that it should declare itself competent with respect to these applications, and the Tribunal therefore finds that it is competent under article 2 of its Statute.

IV. In the view of the Tribunal, the central issue before it is whether there has been non-observance of the contracts of employment of the Applicants. As the Applicants concede in their written observations, neither Applicant is alleging that any provision of his supernumerary contract of employment has been violated. No provision of those contracts has ever provided for a dependency allowance, or has incorporated by reference any staff regulation or rule which does. On the contrary, paragraph 21 of the contracts expressly states that "No allowance or entitlement other than those specified in this contract attach to the appointment." From the inception of their employment with the Organization, the Applicants were fully aware of the nature of their supernumerary appointments and could not help but know that no words in the contracts incorporated the Staff Regulations or Staff Rules, or entitled them to the dependency allowance.

V. Despite their acceptance of supernumerary contracts of employment on terms markedly different from the contracts of employment of staff members to whom the Staff Regulations and Staff Rules are contractually made applicable, the Applicants contend that the Tribunal should interpret the Staff Regulations and the Staff Rules, as well as the IMO Convention and its Headquarters Agreement, in a manner that would accord to the Applicants terms and conditions of employment identical to those of regular IMO staff not employed under supernumerary contracts of employment. In effect, the

Applicants ask that the Tribunal create contracts of employment for them quite different from the ones they agreed to. This the Tribunal has no authority to do.

VI. The IMO Assembly over the years has consistently authorized the Secretary-General to resort to temporary assistance in addition to the list of posts it has approved to carry out the work of the Organization, and it has budgeted and appropriated separate amounts for that purpose. At no time during any period pertinent to these appeals did the Applicants encumber posts budgeted for and approved in IMO Assembly resolutions for staff members to whom the Staff Regulations and Staff Rules were applicable.

VII. Against this background, and in the face of the unequivocal language of the supernumerary contracts of employment, the Tribunal is unable to accept the Applicants' contention that staff rule 101.1 may be properly interpreted as supporting the view that the Staff Regulations apply to the Applicants because those regulations are not referred to and because the Applicants are not within the excepted category of staff rule 101.1. The Tribunal neither agrees with the contention nor accepts the conclusion that the Applicants must be treated as staff members.

VIII. The same may be said of the Applicants' argument that paragraph 6 of annex 1 to the Staff Regulations is germane to the issue in this case. That paragraph provides, inter alia, for the manner of determining salary scales for the General Service category. Even if the Secretary-General, as a matter of discretion, chose to determine salary scales in that manner for persons serving under supernumerary contracts, it would not follow that persons serving under such contracts were therefore automatically eligible for a dependency allowance under staff regulation 3.3(c). Whether a person in the employ of the Organization is covered by staff regulation 3.3(c) is dependent upon that person's contract of employment.

IX. The Applicants also argue that, despite the terms of their supernumerary contracts, they are entitled to the same treatment as employees holding other types of contracts of employment by reason of article 47 of the IMO Convention. That article provides:

> "The Secretariat shall comprise the Secretary-General and such other personnel as the Organization may require. The Secretary-General shall be the chief administrative officer of the Organization and shall, subject to the provisions of article 22, appoint the above-mentioned personnel."

Article 22 provides:

> "The Council, with the approval of the Assembly, shall appoint the Secretary-General. The Council shall also make provision for the appointment of such other personnel as may be necessary, and determine the terms and conditions of service of the Secretary-General and other personnel, which terms and conditions shall conform as far as possible with those of the United Nations and its specialized agencies."

X. Whether or not the Convention creates rights as between employees and the Organization is an issue that need not be reached in this case. (Cf. Judgement No. 437, Ahmed, para. VIII (1988)). The Tribunal sees nothing in article 22 which bears on the question here. The Tribunal notes, in addition, that, despite the facts set forth in paragraph VI above, the essence of the Applicants' arguments with respect to the IMO Convention is that the Secretary-General had no authority to act as he did in employing them under supernumerary contracts. In short, having accepted such employment and the benefits therefrom, the Applicants are now challenging the basis of the Secretary-General's action from which they derived benefits. With the possible exception of extraordinary circumstances, not present here, the Tribunal would not be inclined to entertain a contention of that nature. (Cf. Judgement No. 452, Acebes, para. IX (1989); see also In re Clark, ILOAT Judgement No. 1396, para. 7 (1995)).

XI. The Applicants' arguments also rely, in part, on their view as to the interpretation and application of the IMO's Headquarters Agreement. The Tribunal has held that it is not normally empowered to interpret or apply a Headquarters Agreement. (Cf. Judgement No. 588, Darlington (1993); Judgement No. 642, Sow, et al. (1994)). The Tribunal notes, however, that because an employee of the Organization may fall within the definition of an "official" for the purposes of the Headquarters Agreement, that, in itself, does not mean that the Organization must observe terms and conditions of employment different from those contained in the Letter of Appointment. Nor does the fact that the Applicants' supernumerary contracts now provide for their participation in the UN Joint Staff Pension Fund support their position. Their status was changed only with respect to pensions. This change came about through an amendment of their contracts which resulted from action by the UN General Assembly in 1982, to the effect that officials who were not staff members would begin participating in the Pension Fund on the same conditions as staff members. Prior to the amendment, the Applicants were not entitled to Pension Fund coverage by the express language of paragraph 21 of their contracts that "Holders of supernumerary appointments are NOT entitled to participation in the United Nations Joint Staff Pension Fund." (Cf. Judgement No. 423, Isaacs (1988)).

XII. The Tribunal understands and is not unsympathetic with the discomfort of the Applicants and their sense of insecurity stemming from lengthy service under a series of supernumerary appointments. This alone, however, is no justification for the type of relief sought by the Applicants from the Tribunal. As noted above, the Tribunal's function is to remedy instances of non-observance of contracts of employment; it is not the Tribunal's function to revise employment agreements or create new ones. Here, no non-observance of any contract of employment was alleged and none could be found. What the Applicants seek in this case is for the Secretary-General or for the IMO Assembly to grant or withhold; it is not a matter for

the Tribunal. However, the Tribunal recommends that further consideration be given to the possibility of adopting a more definitive schedule for determining what is to be the ultimate status, in all its aspects, of supernumeraries in order to address the problems of uncertainty and insecurity created by lengthy service under successive short term appointments. The Tribunal notes that the Secretary-General eventually took a definitive measure with respect to the Applicant Traini, by granting him a probationary appointment with effect from 1 February 1991, and subsequently, by awarding him a regular appointment with effect from 1 February 1992, and in the case of the Applicant Nuñez by awarding him a probationary appointment, with effect from 10 April 1995.

XIII. For the foregoing reasons, the applications are rejected.

XIV. Mr. Tobias Nehmy Neto has submitted an application to intervene in case No. 745, Nuñez, alleging that his position is in all relevant respects identical with that of Applicant Nuñez. He requests that the Tribunal's judgement in case No. 745 apply to him mutatis mutandis. The Tribunal grants his request for intervention and rejects his pleas.

(Signatures)

Jerome ACKERMAN
President

Hubert THIERRY
Member

Mayer GABAY
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/694
21 July 1995

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 694

Case No. 769: CHEN

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Hubert Thierry; Mr. Mayer Gabay;

Whereas at the request of Rene Chen, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 30 June 1993;

Whereas, on 25 June and 5 November 1993, the Applicant filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 3 December 1993, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

> "(1) To order the Secretary-General to implement the recommendations of the JAB Panel.
>
> (2) To order the Secretary-General, in case he does not implement the recommendations of the JAB Panel, to pay to the Applicant an appropriate compensation for the damage resulting from having been eliminated from the G to P examination. This damage includes:
>
> > (a) A loss in salary resulting from the fact that the Applicant would not be promoted to a P-2 post. ..., which would cumulate to an approximate 36,000 dollars by the time the Applicant would reach retirement age.

(b) A loss of pension which ... would cumulate to an approximate 30,000 dollars over the 18 years of remaining life-expectancy after age 60.

(c) The moral injury caused by the failure to recognize the Applicant's knowledge of the English language, ...

(d) The mental anguish of having had to fight against discrimination."

Whereas the Respondent filed his answer on 14 January 1994;

Whereas the Applicant filed written observations on 14 February 1994;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 25 June 1982, on a three-month fixed-term appointment as a Statistical Clerk at the G-3 level in the Population Division, Department of International Economic and Social Affairs. His appointment was extended for three months and subsequently for three one-year terms. He was promoted to the G-4 level with effect from 1 June 1984, as Senior Statistical Clerk, and to the G-5 level, with effect from 1 June 1985, as a Computer Programming Assistant. On 1 January 1986, his appointment was extended for a four-month term. Subsequently it was renewed for an additional eight-month term. On 1 June 1986, he was promoted to the G-6 level. On 1 January 1987, his appointment was converted to probationary, and on 1 September 1987, it became permanent.

In 1983, the Applicant, a Chinese national, passed the language proficiency examination (LPE) in English. In 1987, he sat for the competitive examination (G to P) in the Electronic Data Processing category (EDP). In accordance with applicable guidelines, he chose to write part of the examination in Chinese, and to sit for a special language test (SLT) in English. He passed the SLT in English and was ranked 5 out of 45 candidates in the EDP occupational group.

In 1989, the Applicant again sat for the G to P examination, and wrote the entire examination in English. He was ranked 6 out of 26 candidates in the EDP occupational group. In 1990, the Applicant sat for the G to P examination in Telecommunication and Engineering. He wrote part of the examination in Chinese and again sat for the SLT in English, which he passed.

On 19 September 1991, the Applicant sat for the G to P examination in the EDP category, writing part of the examination in Chinese, and again taking the SLT in English. In a memorandum dated 10 March 1992, the Chief, Examination and Tests Section, Recruitment and Placement Division, Office of Human Resources Management (OHRM), informed the Applicant that his score on the SLT "did not meet [the] required standard" and that he had been eliminated from the examination process.

In a memorandum dated 13 March 1992, the Applicant asked the Chairperson of the Central Examination Board to allow him to take the oral part of the examination if his EDP test scores met the requirements. He noted that he had written "nearly the entire examination in English, using Chinese only for some summaries and for the section on international affairs" and that he could have taken the entire test in English. He also noted that he had passed the LPE in English in 1983, and had passed the SLT in English on the 1990 G to P examination. On 20 March 1992, the Chairperson of the Central Examination Board replied that because the Applicant had elected to take the SLT in English and did not meet the standard required, he was "not qualified to be considered" for the oral examination.

In a memorandum to the Secretary-General, dated 31 March 1992, the Applicant requested administrative review of the decision to eliminate him from the G to P examination. In a reply dated 12 May 1992, the Director, Staff Administration and Training Division, OHRM, replied that although the Applicant had previously passed the LPE and the SLT, "the purpose of the special language test is to ascertain in an objective manner the current proficiency of the candidates in one of the working languages of the

Secretariat." As he had not passed the 1991 SLT in English he had been properly disqualified from continuing the examination, and the challenged decision would therefore be maintained.

On 2 June 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB). On 10 November 1992, the JAB adopted its report. Its considerations and recommendations read, in part, as follows:

> "10. The Panel considered that Appellant was correct in citing GA-RES-2480B as decisive. Since he had obtained a language proficiency certificate in English, his knowledge of it for official purposes had been confirmed. ST/AI/370 and ST/IC/1991/42 were and are defective in that the requirement for a special language test contradicts the language and intent of the resolution. Respondent is clearly confusing means and ends when arguing that the purpose of the language proficiency examination (LPE) is to establish an entitlement to language allowance, and, like the Examination and Tests Section (ETS), seems to take the view that internal administrative arrangements take precedence over General Assembly resolutions. Respondent correctly points out that after five years Appellant could have been required to sit the LPE again, but fails to draw the proper inference. Since the Administration did not require him to do so and continued to pay him the language allowance, it explicitly recognized his continued proficiency in English.
>
> 11. The Panel concluded that the requirement of a special language test was discriminatory, not solely in the case of Appellant, but for all those staff members taking competitive examinations who, like him, had earlier successfully passed the LPE.
>
> ...
>
> Recommendations
>
> 13. The Panel found that, unless remedied, the decision to eliminate Appellant from the competitive examination will have a serious and prejudicial impact on his career.
>
> 14. The Panel recommends, therefore, that:
>
> (a) ETS reconvene two staff members of the specialized Board to score Appellant's written test and if his grades warrant it, to conduct an oral examination. If his combined score is as high or higher than that of the lowest scoring successful candidate in the examination,

Appellant should be promoted to the professional level, effective the same date as that of the first promotion resulting from the examination;

(b) If, for any reason, the above procedure cannot be followed, Appellant should be granted a special post allowance (SPA) to the professional level from the date of the first promotion resulting from the examination and until the completion of the next competitive examination in the Electronic Data Processing category. If Appellant is successful in that examination, his promotion should be made retroactive to the date of commencement of his SPA;

(c) The administrative instruction (ST/AI/370) be amended to indicate that staff members who have successfully sat the LPE in English or French will not be required to take the special language test. While making this amendment, the remainder of the text should be rewritten in clearer and more precise terms. Future information circulars should reflect the amended text."

On 26 February 1993, the Director of Personnel transmitted a copy of the JAB report to the Applicant and informed him as follows:

"... The Secretary-General cannot accept the recommendations of the Board which are based on your having passed the English language proficiency examination (LPE) in 1983. Success in the LPE examination is not a substitute for success in the SLT test, since those two sets of examinations fulfil two entirely different objectives: briefly, the LPE tests knowledge to read and understand a passive language while the SLT seeks to test the ability of candidates to work in English or French, the two working languages of the Secretariat. The Secretary-General also notes that [the] JAB recommendations are unacceptable since they would, in essence, exempt you from the SLT and thus result in unequal treatment with respect to other candidates who may have passed the LPE or the SLT in English or French in previous years, but who were asked to sit once again for the SLT in 1991 in accordance with ST/AI/370. He has decided, therefore, to maintain the contested decision and to take no further action on your case."

On 3 December 1993, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant has established his proficiency in English by passing the language proficiency test established pursuant to General Assembly resolution 2480 (XXIII) B of 21 December 1968. Requiring him again to establish such competence is inconsistent with that resolution, and violates his rights.

2. The current rules of the G to P examination discriminate against non-native English or French speakers, which violates the intent of General Assembly resolution 37/235 D.

Whereas the Respondent's principal contentions are:

1. The conditions for the G to P examination are specified in administrative instructions which bind staff competing for the examinations.

2. The conditions for the G to P examination are not inconsistent with General Assembly resolution 2480 (XXIII) B which establishes a language incentive scheme to encourage greater linguistic proficiency of the Secretariat and does not purport to regulate the conditions for promotion to the Professional category from other categories.

The Tribunal, having deliberated from 11 to 21 July 1995, now pronounces the following judgement:

I. The Applicant appeals from a decision of the Secretary-General not to accept the recommendation of the Joint Appeals Board (JAB). He argues that he has established his proficiency in English by having passed the language proficiency examination (LPE) established pursuant to General Assembly resolution 2480 (XXIII) B. Hence, any decision requiring him to re-establish his language proficiency through a different test is inconsistent with that resolution and violates his rights. Consequently, he asks the

Tribunal to implement the recommendations of the JAB and, in the alternative, to award him appropriate compensation for the damage he suffered from having been eliminated from the examination.

II. The central issue in this case is whether the Applicant's rights were violated by the administrative decision to eliminate him from the examination because he chose to take and failed the special language test (SLT) despite having passed the English language proficiency examination (LPE). This issue must be considered both in the light of General Assembly resolution 37/235 and administrative instruction ST/AI/370, dealing with the G to P examination. The relevant provisions are set forth below:

General Assembly resolution 37/235 D of 21 December 1982:

> "Requests the Secretary-General to permit candidates participating in competitive examinations for passage from the General Service category to the P-1 and P-2 levels of the Professional category to take the examination in any of the working languages of the regional commissions, with due regard to the proficiency requisite of the working languages of the Secretariat."

Administrative instruction ST/AI/370 (paragraph 25) of 21 May 1991:

> "In accordance with General Assembly resolution 37/235 D, candidates participating in the examination shall be permitted to take the examination in any of the working languages of the regional commissions, with due regard to the requisite proficiency in one of the working languages of the Secretariat. In order to demonstrate such proficiency, all candidates will have to take section II of the general paper in either English or French. Alternatively, candidates may elect to take the whole written examination in a working language of a commission other that English or French and to sit for a special language test in either English or French. ..."

Information circular ST/IC/1991/42 (paragraph 5), of 1 July 1991, reiterates the provisions of ST/AI/370.

The Tribunal considers that this instruction clearly specifies that candidates must take the examination either in

English or French. Alternatively, if a candidate elects to use another working language of the United Nations, he or she must successfully pass a SLT in English or French.

III. The Tribunal agrees with the Respondent's submission that General Assembly resolution 2480 (XXIII) B, of 21 December 1968, does not deal with the conditions for promotion from the General Service to the Professional category. This resolution sets forth, inter alia, the linguistic requirements for recruitment and promotion of staff in the Professional category subject to geographical distribution.

The Tribunal will not enter into a discussion of the reasons that might have motivated the language requirements for staff seeking promotion from the General Service to the Professional category. These promotions are permitted solely by competitive examination. (Cf. Judgement No. 266, Capio (1980)). The examination encompasses language requirements, by virtue of the General Assembly request to the Secretary-General, contained in its resolution 37/235 D of 21 December 1982, quoted above.

The Tribunal will confine itself to an analysis of the relevant texts, which are General Assembly resolution 37/235 D and administrative instruction ST/AI/370. General Assembly resolution 2480 (XXIII) B is not relevant as it does not apply to staff sitting for the competitive examination.

IV. The Applicant claims that since he demonstrated his proficiency in English by passing the LPE, his knowledge of English for official purposes had been confirmed and that requiring him to sit for the SLT was discriminatory. The Tribunal does not agree. The Tribunal believes that the Applicant did not provide proof of discrimination. The inequality that he alleges is inherent in a system of official languages and working languages, which are not the mother tongues of all international civil servants. In fact, it could be said that the Applicant may be in a more favourable position than a large number of candidates. As Chinese is an

official language of the United Nations, he has the option of writing his examination papers in his mother tongue and hence, has an advantage over other candidates whose mother tongue is not an official language of the Organization. Such candidates have no choice but to write the whole examination in English or French.

V. The Tribunal concludes that the requirement set forth in ST/AI/370, that staff not taking the written portion of the competitive examination in English or French must pass a SLT in either of those languages, is a reasonable and proper implementation of the General Assembly's request.

VI. For the foregoing reasons, the Tribunal rejects the application in its entirety.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Hubert THIERRY
Member

Mayer GABAY
Member

Geneva, 21 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary